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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

No. [redacted] 57

PAUL C. NORWITT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for
the Ninth Circuit
AND
BRIEF IN SUPPORT THEREOF

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Subject Index

	Page
Petition for writ of certiorari	1
The indictment, sentence, etc.	2
Statement of the case presenting the questions involved	3
(a) Preliminary and explanatory facts	3
(b) Evidence relating to the preparation and filing of the corporate return (Count 1)	6
(c) Evidence relating to the existence and condition of books and records of Norwitt and the corporation	11
(d) Evidence relating to the preparation and filing of the amended returns for 1942 and 1943 (Counts 2 and 3)	15
(e) Evidence relating to the Government's computation of petitioner's taxable income	26
Jurisdictional statement	31
1. Jurisdiction of the court	31
2. The decision and judgment of the Court of Appeals	31
3. Basis upon which it is contended the Supreme Court has jurisdiction and cases in support thereof	31
The questions presented	34
Points relied upon for the issuance of a writ of certiorari	35
Brief in support of petition for writ of certiorari	41
The opinions and judgments of the courts below	41
Jurisdiction	42
Statement of the case	42
Specification of errors relied upon	42
Argument	44
I. The Court of Appeals erred in holding that where a person files a fraudulent income tax return for a particular year and thereafter files a false amended return for the same year, the filing of such amended return constitutes a new and separate violation of 18 U.S.C. Section 145b	44

Page

II. The Court of Appeals erred in holding that petitioner could not rely on the correctness of the amended returns as prepared by his accountant, and that the evidence established wilfulness and intent to defraud 52

III. The opinion of the Court of Appeals is in error in holding that falsity of the corporate return and the two amended returns was established by evidence that amounted to no more than mere speculation, assumption, surmise and conjecture 59

IV. The Court of Appeals erred in limiting its scope of review where insufficiency of the evidence is involved and in holding that there was proof that the corporate return had been filed by petitioner or under his authority 63

V. The Court of Appeals is in error in holding that it is still the rule of law that a judgment will not be reversed where a defendant is charged with two or more offenses and the evidence supports the conviction on any one count and the sentence imposed does not exceed that which might lawfully be imposed on such single count 69

Table of Authorities Cited

Cases	Pages
Abrams v. United States, 250 U.S. 616, 63 L.Ed. 1173	64
Adams v. Woods, 2 Cranch 336, 2 L.Ed. 297	48
Boles v. United States (4th Cir.), 73 Fed. (2d) 772	32
Cave v. United States (8th Cir.), 159 Fed. (2d) 464	32, 46
Dept. of Treasury v. Ingram-Richardson Mfg. Co., 313 U.S. 252, 85 L.Ed. 1313	32, 33
Federal Trade Comm. v. Raladam Co., 316 U.S. 149, 96 L.Ed. 1336	31
Fiswick v. United States, 329 U.S. 211	34, 35, 38, 44, 70
Garrison v. United States (5th Cir.), 163 Fed. (2d) 874	60
Gompers v. United States, 233 U.S. 604, 58 L.Ed. 1115	50
Guzik v. United States (7th Cir.), 54 Fed. (2d) 618	32
Hargrove v. United States (5th Cir.), 67 Fed. (2d) 820	54
In re Rothrock, 16 Cal. (2d) 449, 106 Pac. (2d) 907	71
International Ry. Co. v. Davidson, 257 U.S. 506, 66 L.Ed. 341	31
Leach v. Board of Dental Examiners, 87 Cal. App. 207, 262 Pac. 61	68
Levy v. United States, 271 Fed. 942	51
Lurding v. United States (6th Cir.), 179 Fed. (2d) 419	33, 54
Myres v. United States (8th Cir.), 174 F. (2d) 329	46
Pendergast v. United States, 317 U.S. 412, 87 L.Ed. 369	50
Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 77 L.Ed. 819	33, 63, 67, 68
Reese v. Smith, 9 Cal. (2d) 324, 70 Pac. (2d) 933	67
Towbin v. United States, 93 Fed. (2d) 861	60

Pages

United States v. Cole (DC-Cal.), 90 Fed. Supp. 147.....46, 47
United States v. Irvine, 98 U.S. 450, 25 L.Ed. 193..... 49
United States v. Johnson, 123 Fed. (2d) 111 and United States v. Johnson, 319 U.S. 503 .....32, 45, 59
United States v. Smith, 13 Fed. (2d) 923..... 51
United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L.Ed. 1129 64

Worcester County Trust Co. v. Riley, 302 U.S. 292, 82 L.Ed. 268 31

Yoffee v. United States (1st Cir.), 153 Fed. (2d) 570.... 62

Statutes

18 U.S.C. Sec. 145b 43, 44, 46

26 U.S.C. Sec. 145b; Internal Revenue Code, Sec. 145b.... .....32, 33, 34, 35, 36, 46, 48, 51

28 U.S.C. Sec. 1254(1) 31, 42

Rules

Supreme Court Rules:
Rule 38 33
Rule 38, Par. 5b 32

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No.

PAUL C. NORWITT,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Paul C. Norwitt for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit respectfully shows:

THE INDICTMENT, SENTENCE, ETC.

Petitioner was indicted (R. 3-6) for three violations of attempting to evade income taxes. (26 U.S.C. 145b.)

Count 1, charged that on June 23, 1945, petitioner who was the President of the General Refrigerator Corporation, attempted to defeat and evade a large part of the tax due and owing by said corporation for the fiscal year ending July 31, 1941, by filing and causing to be filed with the Collector of Internal Revenue, a false and fraudulent return alleging that the net income of the corporation for said year was the sum of $317.05 and the tax due thereon was $47.08, whereas the net income for said year was the sum of $9905.68 upon which there was a tax due of $2990.24.

Count 2, charged that on June 23, 1945, petitioner, who during the year 1942 was married, did attempt to defeat and evade a large part of the income tax due by him and his wife for the calendar year 1942 by filing with the Collector of Internal Revenue a false and fraudulent income tax return, wherein it was stated that their net income for said year was $11,540.74 and the tax due thereon was $2731.48, whereas their joint income for said year was $30,808.76 and the tax due thereon was $12,744.37.

Count 3, charged that on June 23, 1945, petitioner, who during 1943 was a married man, attempted to defeat and evade a large part of the income and victory tax due and owing by him and his wife for the calendar year 1943 by filing with the Collector of Internal Revenue a false and fraudulent joint return wherein it was stated that their

net income for said year was $23,081.04 and the tax due thereon was $11,760.88, whereas their joint income was $46,805.43 and the tax due thereon was $24,010.50.[1]

After trial by jury petitioner was convicted on all three counts and sentenced to a year's imprisonment on each count, sentences to run concurrently, and to pay a fine of $10,000 and costs.

At the conclusion of all the evidence petitioner moved the Court for judgments of acquittal (R. 8) which motions were denied. A motion for a new trial was made and denied. (R. 10-11.)

STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED.

(a) Preliminary and explanatory facts.

Paul C. Norwitt was a married man. From 1937 to 1941 he was president of the General Refrigerator Corporation, a corporation engaged in the purchase and sale of used refrigerators; after July 31, 1941, he personally acquired the assets and all capital stock of the corporation and conducted its business as a sole proprietorship. Until December, 1944, Marco Norwitt was Vice President and Barney Norwitt, Secretary-Treasurer of the Corporation. On December 30, 1944, Paul, Marco and Barney Norwitt resigned as officers of the Corporation (R. 482), and sometime prior to December 1944, all the stock of said corpo-

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[1]Although counts 2 and 3 charged the filing of income tax returns in the year 1945, these returns in reality were amended returns. Original returns for the years 1942 and 1943 had been filed within the time required by law.

ration had been transferred to The Mission Company, a corporation. (R. 482.) On December 30, 1944, V. D. Dardi, J. C. Ernst and Frank Morrill were elected officers and directors of the General Refrigerator Corporation in the place of the three Norwitts who had resigned (R. 483), and the attorney for the Refrigerator Corporation was directed to turn over all books and records to the attorney for The Mission Company. (R. 483.)

On June 23, 1945, there was allegedly filed, as a delinquent return, an income tax return for the General Refrigerator Corporation for the fiscal year ending July 31, 1941. (R. 24-25.) The return had been prepared in 1941. It was signed by Paul C. Norwitt as President and by Marco Norwitt as Vice President. *This return was actually prepared in 1941* (R. 452) *though neither acknowledged nor filed until 1945 and at a time when neither Paul nor Marco Norwitt were officers, directors or stockholders in the corporation.*

On April 15, 1943, Paul C. and Freda Norwitt filed their joint income tax return for the year 1942 (Government's Exhibit 2) and on June 23, 1945, they filed their amended return for 1942 (Government's Exhibit 2), together with delinquent returns for 1939, 1940 and 1941.

On March 15, 1944, Paul and Freda Norwitt filed their original joint income tax return for the year 1943 (Government's Exhibit 3) and on June 23, 1945, filed their amended return for the year 1943. (Government's Exhibit 3.) *Counts 2 and 3 of the Indictment are based on the amended returns filed in 1945 for the years 1942 and 1943.*

In 1943, a fire occurred in appellant's place of business, partially destroying some and making illegible other of appellant's books and records. (R. 202.)

Appellant conceded that the two original, individual income tax returns filed in 1943 and 1944 by Paul and Freda Norwitt were inaccurate and understated the taxable income; but appellant was not on trial for having filed these returns.

Early in 1945, appellant, being desirous of correcting the inaccurate individual returns filed in 1943 and 1944 and to file returns for 1939, 1940 and 1941, employed Nathan Spivock, a certified public accountant, to figure out and make amended returns for the years '42 and '43 and to file delinquent returns for the preceding 3 years. Spivock, being unable to make a full and correct return based on the partially destroyed records of appellant, after conferences with the Internal Revenue agents, decided to make such returns on a net worth basis. He took all of appellant's assets as of December 31, 1944, as appellant's net worth on the latter date; he then started appellant out as of January 1, 1939, with no assets or net worth at all and then, after conferences with the Internal Revenue agents, allocated the net worth as of December, 1944, over the preceding years, adding thereto for each year a sum for living expenses for such year. A draft for each year was prepared and submitted to the Internal Revenue agents and *the Internal Revenue agents had returns corresponding thereto typed in the offices of the Internal Revenue Department and sent down to appellant for his and his wife's signatures.*

The theory of the Government (R. 20-22) was to the effect that appellant had falsely represented that all his records had been destroyed and had concealed a great mass of sales tags showing sales of refrigerators, etc., which were not included in his reported income; that he had concealed these sales not only from the Government but from his own accountant. The Government also relied on the computations of Agent Bobadilla to establish that the reported income for the years in question was too low.

(b) Evidence relating to the preparation and filing of the corporate return. (Count 1.)

There was produced in evidence as Government's Exhibit 1 (R. 24-25) an income tax return for the General Refrigerator Corporation for the fiscal year ending July 31, 1941. The return bears the signatures of Paul C. Norwitt as President and Marco Norwitt as Vice-President of the corporation. This return was prepared by a public accountant named William McIntosh in the year 1941 (R. 357-8), who testified that after preparing the return he executed it as the person who prepared the same and turned it over to petitioner. (R. 360.) McIntosh further testified that he had a faint recollection of petitioner signing the return when he turned it over to him in 1941 and recalled making a statement to petitioner that he thought petitioner should sign the same before a notary. (R. 452.) The corporate return bears a filing mark as having been filed with the Internal Revenue Department on June 23, 1945, more than four years after it was prepared by the accountant and the signatures of Paul and Marco Norwitt as President and Vice-President bear the

acknowledgment as of June 25, 1945 and as having been sworn to before Richard E. Korn, a Deputy Collector of Internal Revenue. Korn, when called as a witness by the Government, testified that although his signature appeared on the return, he didn't remember putting his signature there; didn't remember the name of the corporation and didn't know if two names appeared thereon when he "juratted" it and didn't recall when or where it was signed, or who appeared before him. (R. 378-9.)

In February of 1945, Adolph Washauer, Division Chief, General Investigation Section, Bureau of Internal Revenue, wrote a letter to one Arthur Shapro (who was attorney for petitioner and the General Refrigerator Corporation in matters other than taxes), requesting that Mr. Shapro show to him certain books and records of the corporation. (R. 430.) As a result of this letter, Mr. Washauer, accompanied by his assistant, Ralph Mohr, called at the office of Mr. Shapro and the various parties to this meeting testified as follows:

Adolph Washauer testified that he called at Mr. Shapro's office early in May of 1945;[2] that Shapro brought forward a file containing the minutes and certain papers relating to the corporation and among those papers was the corporate return for the year ending July 31, 1941 (R. 292); that he called Shapro's attention to the fact that this return was subscribed and sworn to on October 1, 1941 by Charles E. White, one of his Deputies (R. 294); that Shapro said: "Well, we forgot to file" and that was

[2]This meeting actually took place in February of 1945 as is evidenced by the letter written by Washauer to Shapro (R. 430), and by Washauer's own records. (R. 317-318.)

all that was said and Shapro turned this return over to him and he took it along with some minutes and by-laws of the corporation (R. 294-5); that when Shapro produced the papers, including the return, that he, Washauer, said it was delinquent as it had never been filed; that Mr. Shapro then said nothing; that Shapro gave him the return; that there was no discussion why it had not been filed; that Shapro gave him the return as part of the records he had (R. 335); that the return was given to him for filing by Mr. Shapro but he didn't file it until June 23rd (R. 305) because it was not properly sworn to; that the proper officers of the corporation didn't sign the return in 1941; that it was signed by the proper officers on June 25, 1945. (R. 305-6.)

Ralph Mohr, called by the United States, testified that he had no recollection of seeing the corporate return prior to the month of June, 1945 (R. 491); that he was present at the meeting held in Shapro's office in the early part of February, 1945 where Shapro presented them with certain records and permitted the use of a room where they could examine those records; that he was quite sure there was no income tax return among the records he examined. (R. 492.)

Arthur P. Shapro, called as the only witness on behalf of petitioner, testified that the corporate return for the Refrigerator Corporation for the year ending July, 1941 was never in his possession from January to June of 1945, nor at any other time; that he never delivered that document to Mr. Washauer or to any other person connected with the Government and that he didn't tell Mr.

any of his assistants or deputies or anyone
y should file that document; that the docu-
Washauer or ver in his possession (R. 423-4); that in the
else that they bruary, 1945 he accompanied petitioner to
ment was nev the Collector and went into Mr. Boland's
month of Fe Field Deputy with the Collector of Internal
the office of at Mr. Boland, Mr. Mohr and Mr. Wash-
office (Chief resent; that Boland asked him if he knew
Revenue); tha ration had not filed some tax returns; that
auer were pr oland he had nothing to do with the corpo-
why the corpo e years he mentioned; that Mr. Boland
he told Mr. B n income tax return and Boland said it was
ration for the return for the corporation which they had
showed him an some of the records for the corporation and
an income tax t been filed with the Collector's Office; that
found among she knew nothing about it; that he had never
which had not tax return or tax matters for either Mr.
Shapro said he he corporation (R. 426); that Mr. Boland
handled any t papers on his desk and he opened one of the
Norwitt or the ook out the income tax return form which
had a lot of pa ing on it; that he, Shapro, never examined
folders and to ause he had never handled any income tax
had some typi returns for Norwitt or the corporation (R.
the form beca e received a letter dated February 12, 1945
matters or re Vashauer requesting the minutes, by-laws,
428); that he k certificate book and stock ledger, etc. of
from Mr. Wa on and the documents and records evidencing
charter, stock bulk assets from the corporation (R. 431);
the corporation g the letter Mr. Washauer and Mr. Mohr
the sale of bu him; that he made available to them the books
that following of the corporation; that they took them into
called upon him
and records of

the outer office; that Washauer came back and asked if they could have certain of the records to be photostated and copied, which they did (R. 432); that there was no income tax returns executed or unexecuted turned over to Washauer and Mohr or in Shapro's possession.

John J. Boland, called by the United States, testified that he recalled a meeting in his office in February, 1945 at which Norwitt, Shapro, Mohr and Washauer were present (R. 484-85); that at that meeting he asked Mr. Shapro what records of the General Refrigerator Corporation he could make available for examination and Shapro said he would make some records available (R. 485); that he didn't recall any other conversation; that he didn't recall any conversation about any income tax return (R. 486); that he didn't recall seeing the delinquent tax return for the General Refrigerator Corporation or any similar return at that meeting (R. 487); that he didn't have much recollection about the meeting and didn't recall much else other than discussing the availability of record. (R. 487.)

At the conclusion of all the evidence, petitioner moved for a judgment of acquittal as to count one on the following grounds: (a) That there was no evidence to establish that the return was filed by or under the authority of petitioner; (b) That under a pertinent decision of the Court of Appeals the return constituted no return at all, in that it was not signed by the persons required by law to sign it; (c) That at the time the return was allegedly acknowledged by petitioner and his brother, they

were no longer officers of or connected with the corporation; and (d) That there was no proof that the return allegedly filed was false or untrue.

The trial Court denied the motion. The same points were raised on appeal and the Court of Appeals erroneously decided each of said points against petitioner.

(c) Evidence relating to the existence and condition of books and records of Norwitt and the corporation.

Adolph Washauer, Division Chief, I.R.D., testified for the Government as follows: In February, 1945, Mr. Mohr and I went to the office of the General Refrigerator Corporation to look for Mr. Norwitt, but we were advised he had sold his place and that Dardi & Co. had taken over the General Refrigerator Corporation (R. 287-8); the accountant there said, "Well, here are some of their books." There were about half a dozen books on a table. I did not take the books with me because Mr. Norwitt was not present. (R. 288.) We went to see Mr. Norwitt at his place of business, the National Liquor Store, in April, 1945. We asked him if he were able to obtain his books of the General Refrigerator Corporation and his individual business records. He stated that all the records were burned in two fires. (R. 289.) A few days later Mr. Spivock appeared in our office and said that Mr. Norwitt told him all his records were burned and that he (Spivock) would have to work it out on a basis of net worth. (R. 292.) In my various conversations with Norwitt and Spivock, I was told that all the books and records had been destroyed. I didn't discuss at any time with Norwitt or Spivock that I knew there were books of Mr. Norwitt's

out at the old General Refrigerator place on Mission Street. (R. 313.)

Nathan Spivack, the C.P.A., testified for the Government as follows:

"Q. I s[e]. Did you ask Mr. Norwitt for records to assist yo[u] in preparing amended returns for 1942 and 1943?

A. Yes, [we] asked for necessary papers and whatever is need[ed] to make a proper return.

Q. And [d]id he provide you with adequate records for that pur[pose]?

A. No, [t]here were some records available and there were [s]ome not available.

Q. What [r]ecords were available?

A. Well, [a]t this date I wouldn't know and at that time I didn['t] make a list of it. I knew they were inadequate [t]o prepare 100 per cent proper returns and if ther[e] is any information missing whatsoever it is—the r[e]turn wouldn't be correct, using the partial records [y]ou remember any of the records that were available?

A. No, [I] don't, specifically.

Q. Did [y]ou inspect the records which were available?

A. Yes, I looked at the records.

Q. How much time would you say you spent looking at them?

A. It is hard to say. I spent sufficient time—put it this way: I spent sufficient time to satisfy myself that a pro[p]er return could not be prepared from the records av[a]ilable.

Q. Now, did Mr. Norwitt express to you why there were not c[o]mplete records available?

A. Yes, he stated there was a fire in 1943. In fact, I had seen some of the records which were spoiled by the water damage. The ink had run on some of the sheets and you couldn't read the writing any more. Must have been washable ink. Other records were singed and partially burned." (R. 197-8.)

Q. There was a discussion of the basis on which the income should be computed?

A. Yes, I discussed the matter with the deputy collectors and told them of the condition of the records and that it was almost physically impossible to make a proper return, also the element of time and money, cost of doing. * * *" (R. 202.)[3]

Thomas W. Cleary, Special Agent I.R.D., testified for the Government that in November, 1945, he went to the General Refrigerator Corporation's offices; that Norwitt was no longer there, having been out for a year or more; that he saw quite a pile of records, cancelled checks and sales invoices there of the General Refrigerator Corporation (R. 139-140); that a few days later, accompanied by 3 men from the deputy collector's office he went back and took the records, etc., away. (R. 141.)

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[3]Mr. Spivock testified that the collectors were in quite a rush to get the returns completed; that they said they were anxious to have it rapidly "In fact, wanted it so rapidly they typed it themselves." (R. 231.)

Mr. Washauer testified that he told Spivock that their (the Government's) fiscal year ended June 30, 1945; that they wished to put those assessments on before their fiscal year ended; that they would have to cut their week to about June 25 in order that their report would arrive in Washington about August 1; that as Spivock said his office was too busy to type the returns before the 25th, that the collector's office would type the returns as an accommodation to both sides. (R. 307-8.)

I also found some additional sales invoices off the garage at 32 Crescent Avenue. (R. 143.) I learned that the State Board of Equalization had been making an investigation and procured from that Board journals and sales ledger sheets for the last 3 months of 1943 and records for 1944. (R. 146.) In October of 1947, Mr. Norwitt came to see me in response to a letter I sent him and I asked him for the rest of his books. He said he would bring them in and he did so the next week. (R. 147.) The records I then had, *there were some missing parts.* One I was concerned particularly with, *the sales register for 1942 was missing for the whole year.* (R. 147.) There were ledger sheets for '41, '42 and '43, except a part of 1942 and 1943 was reconstructed from the journal. (R. 148.)

"Q. Now, you also made some reference to some records being reconstructed. What did you mean by that?

A. There was a part of the sales ledger for either '42 or '43 missing which I put in the amounts I thought should be there, tied it in with the (original) returns and figures found from other sources.

Q. So you reconstructed that part?

A. Yes, I did." (R. 179.)

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A. I had a cash receipts register when it recorded cash sales.

Q. I see. Was any part of that missing?

A. I didn't inquire too closely. I really can't say. *It was my impression that parts of all the records were missing, certain parts,* but I don't know." (R. 178-9.)

Lastly, Mr. Clearly sums up his whole testimony and the case as follows: *"I can't be sure of anything in this particular case. I am not sure of anything,* but——" (R. 185.)

(d) Evidence relating to the preparation and filing of the amended returns for 1942 and 1943. (Counts Two and Three.)

In February of 1945 the Internal Revenue Department requested that petitioner furnish a statement as to his net worth condition at the end of 1944. (R. 290, 427.) This was prepared by Mr. Spivock, the C.P.A., and filed in May of 1945. This statement showed Norwitt's net worth as of December 31, 1944 to be $57,360.40 including assets in the sum of $112.50 (R. 212) and a savings account in the San Francisco Bank of $1466.99. (R. 213.) The evidence established that this net worth statement was only incorrect in one particular, that the U. S. Bonds should have been $225 instead of $112.50. (R. 213-4, 241.)

Nathan Spivock, called as a witness on behalf of the Government, testified:

I did work for Norwitt in 1945 to prepare his 1944 income tax returns. Mr. Stephenson was in my employ and he handled most of the details.

The original return of Paul C. Norwitt for the year 1944 now shown me is the return to which I have reference. This was filed May 15, 1945. We needed some additional information. We ascertained that there was some missing information, particularly of rents, and we needed depreciation figures, so we asked for the prior years' returns. I believe they were supplied. (R. 193.)

When I inspected those returns, I discovered that no rents had been reported in the returns. I reported that to Mr. Norwitt. He didn't give me any instructions. I made the suggestions that the returns be amended and corrected. (R. 194.)

In order to prepare the amended returns for 1942 and 1943, we had discussions with the deputy collector's office. (R. 199.)

We ultimately used the net worth method. At the first discussion at the collector's office, I am almost sure Mr. Washauer was present, but I wouldn't be positive. We had several such discussions; I do not know over how long a period of time such discussions took place, maybe a month or two months, leading up to the filing of the amended returns. (R. 200.)

The main subject of the discussions with Washauer and Ralph Mohr and Mr. Stephenson was the best way to get this thing straightened out. The collector's office asked for a financial statement. That was the starting point, and from there on it came out that they wanted the prior returns, so we informed them that we had started already on the '42 and '43. They asked what about the '39, '40 and '41? So I inquired of Mr. Norwitt whether he had filed any. He said he thought he had, but the collector's office said they had no record. *I told deputy collectors of the condition of the records and that it was almost physically impossible* (R. 201) *to make a proper return, also the element of time and money and the cost of doing so. So we discussed it back and forth and we finally agreed to use the net worth method and file the returns that way.*

First of all, we had the necessary information to prepare the 1944 tax return. There were books and records on that, so we prepared separate returns for that year upon the basis of books and records which were available. For the other returns, since it was impossible to prepare a 100% proper return, we decided on the net worth basis. So we determined to use December 31, 1944, net worth inasmuch as that was the end of the year closest to the time this increase started. I believe we started with January 1, 1939. (R. 202.) Defendant's Exhibit A for identification indicates very plainly that the years from 1939 to 1943 were involved. That is the original of the typewritten statement which is attached to each of these returns that were later prepared by Mr. Stephenson and myself. We didn't file the returns. We prepared them. (R. 203.) The note on top of the statement says: "To be attached to 1939, 1940, 1941, 1942 and 1943 returns. The amounts shown as other income represents estimated living costs and is added pursuant to an informal understanding of the Office of Collector of Internal Revenue. The amount in item 8 of the 1941 return and the additional amount added to item 9 of the amended 1942 return represents the difference between (1) the taxpayer's net worth as of December 31, 1944, and (2) the amount of income reported on the 1944 and 1942 returns and the amended 1943 return. This is in accordance with an informal understanding with the Office of Collector of Internal Revenue. It is not possible to obtain exact figures or details, because the taxpayer's records were destroyed by fire in 1943." (R. 204.)

We had quite a few discussions and I informed the collector's office that I would throw the smallest amounts in the earlier years and the biggest amounts in the later years, which would be the most probable answer, instead of dividing it equally between all the years. Part of this net worth increase was spread through all years involved, 1939 to 1943, inclusive. (R. 205.)

The computation involves consideration of living expenses for a net worth computation, that is the adjustment on account of the net worth basis. We had information as of the end of the period. We did not have information as of the beginning. We assumed the beginning of zero, which would be detrimental to the taxpayer if he had anything at all. He would have paid that much less. We assumed January 1, 1939, as the point of time. (R. 208.)

The ending point of my net worth period was December 31, 1944. *I personally obtained everything possible as to Mr. and Mrs. Norwitt's assets and liabilities.* (R. 209.)

I deducted certain living expenses in preparing these returns. I asked Mr. Norwitt what his living expenses were for these years. He gave me certain figures, the amounts of which I don't remember at present. I brought them back to the Deputy Collectors and showed them the figures. I also pointed out certain details making up the figures. For example, his rent in 1939 was $23.00 a month. He had later bought a home and his total payments for interest, principal, taxes and insurance were $54.00 a month. He had one life insurance policy on which he paid $87.00 a year less approximately $25.00

what they call dividends a year. That period was 1939 to 1943, inclusive. I took those figures to the Deputy Collectors' office and I believe we finally raised them and the final figures were used in the amended returns. (R. 216.)

I had no knowledge of any large group of invoices in 1932, or other items which had been unrecorded. *If I had known of such invoices, I would still have used the net worth method* (R. 218), *because some of the documents and records were missing. Without all the records, you cannot make a proper return.*

I might state there appears to be an overcharge over the net worth system of about $10,000. I told Mr. Stephenson what to do and he made the allocations and apparently a $10,000 error crept in in favor of the Government. Using the net worth basis, the total income to be reported from 1939 to 1944 should have been in round numbers $70,000. In computing Mr. Norwitt's net worth as of January 1, 1939, I started him at zero. For the purpose of my computation, he had no property nor assets of any kind on that day. He did have something. He had stock of the General Refrigerator Corporation, which was a corporation at that time. I don't know the value. It wasn't too much. (R. 225.) It might have been worth $3,000, or something like that. That is just my guess. I don't think he had any property but I don't know. It is my estimate that he had at least $3,000 that I know of at that time.

Assuming that the net worth as figured out in the statement of $57,360.40 was correct, and it started from

zero, actually that figure was approximately $3,000 in favor of the Government again. I explained that to the deputy. I stated I would weigh heavily against Mr. Norwitt and in favor of the Government because he did not have complete records. The original returns of 1939, 1940, 1941, 1942 and 1943, the ones that were filed in 1945, were typed up in the office of the Collector of Internal Revenue. (R 226.)

None of these were typed in my office. The collector typed the returns, retained them, brought them to the taxpayer and had the taxpayer sign them, and then of course the collector, after they were signed, still retained them. (R. 228.)

My testimony is that, taking this as the ending net worth to be accounted for and assuming zero starting point, at some point prior to this, the increase in net worth which is reported here by the excess of assets over liabilities was spread back through several of these returns for several years. I believe that if we will read the second paragraph carefully it does substantiate what has actually been done and that a $10,000 error has crept in there somehow. (R. 233.)

The salaries that he received from the corporation were taken up in the returns and that was in addition to the increase in the net worth plus the living expenses. Those salaries were erroneously included. I did not ascertain what his net worth was at the beginning of 1941. I don't know what it is now. We didn't make any attempt to because we used the beginning of '39 as being zero and he didn't have much. (R. 236.)

Harry Stephenson, the accountant employed by Spivock, estified for the Government as follows:

I found evidence Mr. Norwitt had some rental income rom these properties. When I checked the original re-urns for 1942 and 1943, I did not find any rental income eported. For that reason, I undertook the preparation f amended returns. I advised him it would be the best hing to do, to get them amended and get out of trouble. Mr. Norwitt told me he had been engaged in a business known as the General Refrigerator Corporation. I asked him for records of that business and his reply was that they had been burned in a fire. (R. 35.)

In looking over my working papers I found where there were some unrecorded sales added into the returns. I believe it was 1943, but it might also have been 1942. I mean, it may have been both years. I can't recall. The papers now handed me are the working papers in the case of Mr. Norwitt. I did not prepare all of them, but substantially all of them. (R. 36.)

All the field work, I believe, was done by me. Looking at those papers, there is a schedule of unrecorded sales which was not in the papers the last time I looked at them. That refreshes my recollection as to the year in which I say additional sales were reported on the amended return. It was 1943. The amount that was added to the amount originally reported as sales was a total of $9,180. It represents 51 refrigerators which were sold. (R. 37.)

To the best of my recollection, I obtained the information that appears on that working sheet from Mr. Norwitt, but I can't be positive; after six years I can't be

positive. In preparing the amended return, I added this amount of refrigerator sales which had not been reported in the original return. (R. 38.)

I was present at at least one conference with the collector's office. I don't recall when that took place. (R. 55.) It was in June I believe, it was naturally prior to June 23, 1945, the filing date which those returns bear. Mr. Washauer, who testified here this morning, was present at that conference, and I believe Mr. Mohr. I can't recall what was said at the conference, but *the purpose of the conference was to arrive at figures for his living expenses which would be satisfactory to the Government. There was some discussion about the amount of the estimated living expenses. We had to arrive at an amount which we felt would be satisfactory to the Government. As I recall it, we talked about so much per month.* (R. 56.)

The amended returns or delinquent returns for the years 1941, 1942 and 1943 were prepared without reference to the original returns. So far as I know, they were prepared for the purpose of representing to the Government the full taxable income for those years. These amended returns were prepared upon the basis that the original returns were not correct and in preparing the returns for 1941, 1942 and 1943 the net worth system of computation was used. In using that system, I computed the unaccountable difference between his reported income, or the income as I was able (R. 66) to determine it, and the net worth figure at the end of the period, and that was done, so far as my office or I was concerned, for the purpose of representing to the Government the entire taxable income.

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Vashauer testified for the Government as fol-

ril Mr. Spivock appeared and asked to discuss

r. Mohr and I were present on behalf of the

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rds were burned so he, Spivock, would have

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ate) return be turned over to him (R. 295);

et worth papers were being resubmitted for

on, Spivock brought back the corporate return

Mr. Spivock, Mr. Roder and I had a meeting

1945 in the Collector's office—we discussed

rth statement (R. 296-7); our next meetings

pivock were on June 12 and 13, 1945 at which

r. Mohr and I were present. We had another

June 22 at which meeting amended returns

itted by the accountant. No representative of

or suggested the use of a net worth statement

our meetings; that suggestion was made by

k (R. 297); no one in the Collector's office

greement with Norwitt or Spivock that returns

on the net worth basis would be accepted as

299).

e witness produced his appointment book show-

lowing appointments with Mr. Spivock relative

and the General Refrigeration Corp.:

6, 1945; June 4, 5, 6, 12, 13, 22, 23. (R. 317-

ot tell Mr. Spivock he could use a 1944 net

ement. I made no suggestion whatsoever. That

was his business. He is the accountant. He had power of attorney, he didn't tell me anything. He said he would prepare a net worth statement for a certain period. That is all he told me. I didn't say nothing. *(sic.)* That is his prerogative to do whatever he pleases. It is my business to help the taxpayer. You know the accountant. He is a CPA. He is capable of handling himself. I don't know of any request being made up to the time of June 23, 1945 of Mr. Spivock or Mr. Norwitt for a net worth statement as of the end of each year 1941, 1942, 1943 or 1944. (R. 325.)

The only discussion Mr. Spivock had with us was about living expenses. I am stating for the record, that you can draw up a net worth statement including living expenses as part of the net worth. (R. 326.)

About all that was discussed was about living expenses. Nothing was discussed as to how the figures had been arrived at. Nothing was discussed as to what this man's net worth was at the end of any year. That was a sworn statement. We didn't have to discuss it at all. (R. 327.)

The sum and substance of my testimony is that Mr. Spivock came in and all I did was listen. I haven't much recollection of what was said. The matter was under investigation. I accepted it. The Bureau accepts anything a taxpayer or a taxpayer's representative submits to the Bureau of Internal Revenue while the matter is still under investigation. We must accept anything. The purpose of the conference was not at all to see what should be filed. Mr. Spivock called on me to submit a net worth statement and the increase in net worth. (R. 328.)

The purpose of the conference with Mr. Spivock from the time I got the financial statement until June 22, 1945 was that Mr. Spivock, the accountant for the taxpayer, wished to file amended returns on the basis of net worth increase. No discussion was necessary and we accepted as the taxpayer or taxpayer's accountant presents it for the Bureau of Internal Revenue. He could probably have done that without talking to me about it. If he didn't file with us, we would ask him to bring that information in. When he brought it in, he showed me what I call his working sheets. *The topic came up of his living expenses. He suggested a lower figure. I felt it was too low, then he raised the figure to a higher figure. That is his prerogative.* (R. 329.) *There was no rejection. We thought it was too low, so he raised it.* (R. 330.) When he came in on the 22nd, he had the returns all written out in pencil. I didn't look at the figures at all. I don't think any figures were discussed at all. I don't think he discussed with me the net worth statement that had been filed back in May. Mr. Mohr was present on the 22nd. I think that Mr. Spivock did all the talking. I accepted the returns. (R. 331.) I think all these returns were taken down by Gus Roder to be signed. I didn't see the returns at all when they were taken down to Mr. Norwitt.

Gustave C. Roder called as a witness by the Government testified that he was a deputy collector of internal revenue; that he took the delinquent returns for 1939, 1940 and 1941 and the amended returns for 1942 and 1943 down to Mr. Norwitt's office and Mr. Norwitt signed them in his presence (R. 348); that Mr. Washauer handed him the returns on June 22nd and that he, Roder, typed them

up from the hand-written returns (R. 349); that after typing up the returns he made an appointment with Mr. Norwitt by telephone and then went to Mr. Norwitt's office and that Mr. Norwitt's wife was present and signed the returns where her signature was necessary. (R. 350.) When he made the appointment with Norwitt over the telephone "I said that I had a few returns which required his signature which were brought in by his accountant, and that I would appreciate it if he were present, together possibly with his wife, so that they could sign their signatures on the return. Q. Yes. First you identified yourself to him, told him who you were? A. Oh, yes, absolutely." (R. 352.)

When I came to Mr. Norwitt's office he just signed the returns. I was there about ten or fifteen minutes. (R. 353.) (Here the witness was shown the returns for 1939, 1941, 1942 and 1943 and his attention called to the fact that in each instance the signature of Freda Norwitt was signed by Paul C. Norwitt and so appears on the returns [R. 353-5]); that though there were requirements as to who should sign the returns "we wouldn't be very specific about that", we would assume the correct signature was on there. (R. 354.) I stood right there while the returns were being signed but I had no right to question Mr. Norwitt. (R. 355.)

(e) Evidence relating to the Government's computation of petitioner's taxable income.

At no time did the Government attempt to prove the falsity of the amended returns that were filed on the net worth basis. The Government's entire proof was confined to proving that the original returns filed for the years

1942 and 1943 were false, a fact that had been conceded by petitioner.

From the beginning of the trial, petitioner objected to any proof that was directed to the falsity of the original returns filed, asserting that defendant was not on trial for having filed such original returns. (R. 104.) At the end of the Government's case, appellant moved to strike out all of the testimony given by the Government's witnesses Bobadilla and Cleary, dealing with the false character of the original returns. (R. 467-469.) This motion was denied.

William Bobadilla, a deputy collector, testified for the Government that he had added up the sales tags which were found in the Mission Street premises and in the garage, and found that they showed sales for the year 1942 less sales tax, of $9699.28 (R. 120); that the sales tags for the year 1943 totalled, less sales tax, $42,986.43 (R. 122), plus $239 (R. 123); that he had been able to secure a lot of Norwitt's personal cancelled checks (R. 123), most of which were made out to cash and bore no endorsement (R. 124); that he went ahead and scheduled all of those checks *which appeared to him as being personal,* as the personal withdrawals and expenditures of petitioner (R. 124); that the checks so scheduled by him for Norwitt's personal expenses were as follows: For 1941, $3054.52, for 1942, $12,884.74 and for 1943, $15,565.45 (R. 124-5); that he allotted all these checks to Norwitt's personal living expenses because they were all written to cash and as he had no records to verify it *"I presumed they were personal withdrawals"* (R. 244, 245); that he charged them against Mr. Norwitt because

it appeared to him that he went in and took some cash and cashed these checks and then redeposited the checks; that *he assumed* that Norwitt had taken this money in cash and then deposited the check in the bank (R. 249); that he didn't assume that he had also made a deposit to cover the amount of these checks (R. 249); that *he assumed* Mr. Norwitt may have taken that cash; that there was a possibility he may have paid it out of cash and put in the checks as it is written (R. 250); that he didn't adopt the assumption that the money had been paid out on account of business and the check then deposited, although that was possible; that he didn't adopt that theory but adopted the theory against Mr. Norwitt. (R. 250.)

On cross-examination Bobadilla identified a series of checks which he said he had allotted to the personal living expenses of Norwitt for the year 1942 (R. 248-257) and checks he had so allotted for the year 1941 (R. 261-273) and the checks he charged to personal expenses for the year 1943. (267-275.)

Petitioner then intraduced in evidence the check register from January to November, 1941 (R. 471) and the check register from January to September, 1943. (R. 471.) There was no check register for 1942. Petitioner then read into the record from said check registers the entries therein showing the purpose for which the checks in 1941 and 1943 had been issued, the same being the checks that Bobadilla had assumed were for Norwitt's personal expenses. (R. 473-479.) The check register disclosed that of the checks Bobadilla had assumed for Norwitt's living expenses for the year 1941, that $2324.65 thereof was paid

out for business expenses such has payroll, labor, etc., and that for the year 1943, $2022.77 had been paid out for like purposes; that for the year 1942, although there was no check register for this year, the checks corresponding with those which in the year 1943 were expended for business expense, totalled $1612.43.

Thomas W. Cleary, Special Agent, Internal Revenue Department, testified for the Government that he added up the sales tags or invoices found at the Mission Street office and at the Crescent Avenue address and found that for the fiscal year ending July, 1941 there were sales totalling $9026.32 which were not included in the corporate return (R. 159-161); that for the year 1942 the total amount of sales slips which bore no posting was $22,455.45 including sales tax of $624.85 (R. 164); that he arrived at these figures by comparing the sales tags with the sales ledgers (R. 155); that as to the corporate return he found that the sales reported on that return coincided with the amounts shown in the ledger and the sales register (R. 157); that for the year 1943 the sales reported on the original return coincided with the sales shown in the business ledger (R. 157); that he had no sales register for the year 1942 (R. 157); that the sales tags which were recorded in the sales register and ledger seemed to have check marks on them and others had no check marks; that for the year 1942 they found a group of tags that had no check marks on them; that he based the fact that certain sales were not registered in the sales register or other books on the absence of check marks on the sales tag, although there were tags with check marks on them that had not been entered in the books for the

County Trust Co. v. Riley, 302 U.S. 292, 82 L. ed. 268; *International Ry. Co. v. Davidson*, 257 U.S. 506, 66 L. ed. 341; *Federal Trade Comm. v. Raladam Co.*, 316 U.S. 149, 96 L. ed. 1336.

(b) The decision of the lower Court holding that where one has violated Sec. 145b of the Internal Revenue Code by filing a false and fraudulent income tax return for a particular taxable year and thereafter files one or more false amended returns for the same year, the filing of each such amended return constitutes a new and separate violation of said section is in direct conflict with decisions from other circuits, such as the cases of *United States v. Johnson*, 123 Fed. (2d) 111, 119; *Cave v. United States* (8th Cir.), 159 Fed. (2d) 464; *Guzik v. United States* (7th Cir.), 54 Fed. (2d) 618, 619, and *Boles v. United States* (4th Cir.), 73 Fed. (2d) 772, 774. Under such circumstances, this Court has jurisdiction on *certiorari* to review the action of the lower Court. (*Dept. of Treasury v. Ingram-Richardson Mfg. Co.*, 313 U.S. 252, 85 L. ed. 1313.)

(c) The decision of the Court of Appeals holding that where a taxpayer files an income tax return and thereafter files an amended income tax return for the same taxable year, proof of the falsity of the original tax return constitutes proof of the falsity of the amended tax return is in direct conflict with the decision from the 7th Circuit in the case of *United States v. Johnson*, 123 Fed. (2d) 111. Under such circumstances, this Court has jurisdiction to review the action of the lower Court on *certiorari*. (*Dept. of Treasury v. Ingram-Richardson Mfg. Co., supra; Rule 38 of the Supreme Court*, Par. 5b.)

(d) The holding of the Court of Appeals that under the facts in this case petitioner was not entitled to rely on the income computed by his accountant, is in direct conflict with the decision in the case of *Lurding v. United States* (6th Cir.), 179 Fed. (2d) 419, 422 and under such circumstances this Court has jurisdiction to review the matter on *certiorari*. (*Dept. of Treasury v. Ingram-Richardson Mfg. Co., supra, Rule 38 of the Supreme Court.*)

(e) The decision of the Court of Appeals upholds the conviction of a defendant on the testimony of Government's witnesses that amounts to no more than speculation, assumption, surmise and conjecture. This rule is in direct conflict with comparable decisions of this Court in which jurisdiction was exercised to review and correct such error. *Pennsylvania R. Co. v. Chamberlin*, 288 U.S. 333, 344.

(f) The decision of the Court of Appeals that one can be guilty of violating Sec. 145b of the Internal Revenue Code because a corporate income tax return bears the signature of the defendant without any proof that the same was filed by or under the authority of such defendant, presents a new and novel rule of evidence that has not been announced or passed upon by the Supreme Court. In such case this Court has jurisdiction to review the matter involved. (See cases cited under Subpar. (a) above.)

(g) The holding of the Court of Appeals, that in a criminal prosecution where defendant is charged and found guilty of two or more offenses the judgment will

year 1943 and he also found sales tags with no check marks on them which had been entered in the books. (R. 180.)

Augustus B. Brady, technical advisor in the Penal Division in the chief counsel's office in the Treasury Department, testified to a computation he made of the correct income of appellant for the years 1942 and 1943 (R. 409) and produced a mimeographed sheet five pages in length of his computations. These computations were made prior to trial (R. 410) and were based upon the testimony thereafter to be given by Mr. Bobadilla and were made for the purpose of showing that the original returns filed were false. Brady in making his computations took certain figures as being correct from the original returns. (R. 455, 460, 461.) Brady further testifies: "I didn't compute the amended returns". (R. 464.) Brady further testified that he made no computation to figure what the tax due the United States would have amounted to based on the net worth basis. (R. 466.) In other words, all of Brady's testimony and all his computations were solely for the purpose of showing that the original returns were false. This has been admitted at all times.

In the trial Court and Court of Appeals, petitioner contended as to counts two and three of the indictment as follows: (a) That there was no competent evidence to establish the falsity of either amended return; (b) That there was no competent evidence to establish that appellant filed either amended return for the purpose of defeating or evading the tax; that on the contrary, the evidence established that said returns were filed in reli-

ance upon the work of the certified public accountant with the consent, approval, collaboration and request of the Internal Revenue Officers; (c) That the filing of the amended returns did not constitute a violation of Sec. 145b of the Internal Rvenue Code as false original returns for the same years had been filed by appellant and said section can only be violated once for each taxable year.

These contentions of petitioner were erroneously held by both the trial and Appellate Court to be without merit.

JURISDICTIONAL STATEMENT.

1. Jurisdiction of the Court.

The jurisdiction of this Court is invoked under Title 28 U.S.C. sec. 1254(1).

2. The decision and judgment of the Court of Appeals.

The decision and judgment of the Court of Appeals was rendered on March 12, 1952. (R. 506, 527.)

Petition for rehearing denied on April 14, 1952. (R. 528.)

3. Basis upon which it is contended the Supreme Court has jurisdiction and cases in support thereof.

(a) The Court of Appeals' decision, that a person can be guilty of two or more separate violations of Sec. 145b of the Internal Revenue Code for the same taxable year, is a decision on an important question of federal law which has not been but which should be settled by the Supreme Court. In such case this Court has jurisdiction to review the question involved as was held in *Worcester*

not be reversed if the evidence sustains the conviction on any one count and the sentences imposed do not exceed that which might lawfully be imposed on any single count, is no longer the law and in conflict with the decision of this Court in *Fiswick v. United States*, 329 U.S. 211, wherein the Court exercised its jurisdiction on *certiorari*. In view of the language of this Court in the *Fiswick* case, this entire question should be reconsidered by this Court as it constitutes an important question of Federal law.

THE QUESTIONS PRESENTED.

The questions presented and raised by this petition are as follows:

1. Where a person files a false and fraudulent income tax return in violation of Sec. 145b of the Internal Revenue Code and thereafter and for the same taxable year files one or more false amended returns, does the filing of each such amended return constitute a new and separate violation of said Sec. 145b?

2. Where a person files a false and fraudulent income tax return in violation of Sec. 145b of the Internal Revenue Code and thereafter files an amended return for the same year, does mere proof of the falsity of the original income tax return constitute proof that the amended return is false and fraudulent?

3. Where a taxpayer employs an accountant to prepare his income tax return and makes available to the accountant, all books and records that he has and makes full disclosure to the accountant of his assets and liabilities, is

not such person entitled to rely upon the accuracy of the return prepared by his accountant despite the fact that the taxpayer may have lied to Internal Rvenue Agents as to the existence of his books and records?

4. In a prosecution for violating Sec. 145b of the Internal Revenue Code wherein it is necessary that the Government prove unreported taxable income, can a conviction be sustained where the evidence as to such unreported taxable income amounts to no more than mere speculation, surmise and conjecture on the part of the Government's witnesses?

5. Where one who has been an officer of a corporation is charged with filing a false income tax return on behalf of such corporation, can his conviction be sustained where there is no proof that the return was filed by him or under his authority?

6. In view of the language of this Court in *Fiswick v. United States*, 329 U.S. 211, does it still continue to be the rule that where a defendant is charged with two or more offenses, the judgment will not be reversed if the evidence sustains the conviction on any one count and the sentences imposed do not exceed that which might lawfully be imposed on a single count?

POINTS RELIED UPON FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

The Writ of *Certiorari* prayed for herein should issue for each and all of the following reasons:

1. The Court of Appeals has announced the rule that for any one taxable year a taxpayer can be guilty of a hundred violations of Sec. 145b of the Internal Revenue Code. Thus, the Court of Appeals has held that if one has violated this section by filing a false and fraudulent income tax return, he can thereafter again violate this section for the same taxable year by filing false amended returns or by in any other manner attempting to evade the income tax for such year. By so holding the Court of Appeals has done away with the statute of limitations relative to such offense and has in effect held that the initial violation of the section can be repeated day after day and long after the statute of limitations has run as to the initial violation. This presents a new and important question of Federal law. It has never been passed upon by this Supreme Court and should be passed upon for all future guidance.

2. For many years it has been the law that when a taxpayer honestly employs an accountant to prepare his income tax return and makes available to such accountant, all his books and records and such other information as is required and the accountant prepares such return and it is filed, the taxpayer has a right to rely on the return as prepared by his accountant and such facts negative any criminal intent on the part of the taxpayer. The decision of the Court of Appeals herein lays down a contrary rule and announces that the taxpayer is not entitled to rely on his accountant's activities if at some other time and place and to persons other than his accountant he lied about his books and records, his assets, income and liabilities. This rule should not be allowed

to stand and the q[uestion] of this Court.

[d and the question merits the earnest consideration] [Court.]

3. It has alwa[ys] for income tax eva[sion] of proving to a m[oral] doubt that the def[endant] he didn't report in[come] of Appeals herein [holds] of such unreported [income] the testimony of [witnesses] give their assumptio[n] existence of such u[nreported] the Court of Appe[als] accepted and usual [course] conflict with the pre[sumption] of the rule that pro[of] yond a reasonable d[oubt] herein warrants this [Court] its decision re-est[ablishing] criminal cases.

[t has always been the law that in prosecutions] [ome tax evasion, the Government bears the burden] [ving to a moral certainty and beyond a reasonable] [that the defendant acquired taxable income which] [n't report in his return. The decision of the Court] [eals herein lays down the rule that the existence] [unreported taxable income can be established by] [imony of Government's witnesses who merely] [ir assumption, surmise and speculation as to the] [of such unreported income. Such holding of] [rt of Appeals is a marked departure from the] [and usual course of judicial proceedings, is in] [with the presumption of innocence and destructive] [ule that proof of a defendant's guilt must be be-] [easonable doubt. The holding of the lower Court] [arrants this Court in reviewing the same and by] [sion re-establishing the rules of evidence in] [cases.]

4. The Court of [Appeals has held that the mere fact] that an income tax [return bearing the signature of a] taxpayer is found i[n the files of the Collector of Internal] Revenue, constitutes [proof that such return was filed by] or under the author[ity of the taxpayer. This constitutes] a new and novel d[eparture from the rules of evidence] in criminal cases an[d should be reviewed by the Supreme] Court.

5. The Court of [Appeals has relied upon the rule that] where a defendant [is charged and found guilty of two or] more offenses, the [judgment will not be reversed if the]

evidence sustains the conviction on any one count and the sentences imposed do not exceed that which might lawfully be imposed on any single count. In view of the language of this Court in *Fiswick v. United States*, 329 U.S. 211, the present validity of this rule should be re-examined and if such rule be not abrogated, it should at least be restricted in its operation to convictions that do not fall within the class discussed in the *Fiswick* case. Where a man is convicted of several offenses and only one of such offenses finds support in the evidence, the stigma and extra-judicial penalties that will attend the man through the balance of his life as the result of his erroneous conviction on the remaining charges, is a matter that merits the further consideration of this Court. The necessity for a reconsideration of this rule is amplified in our supporting brief.

Wherefore, petitioner respectfully submits that this Honorable Court issue a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit, to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, San Francisco, California,
May 6, 1952.

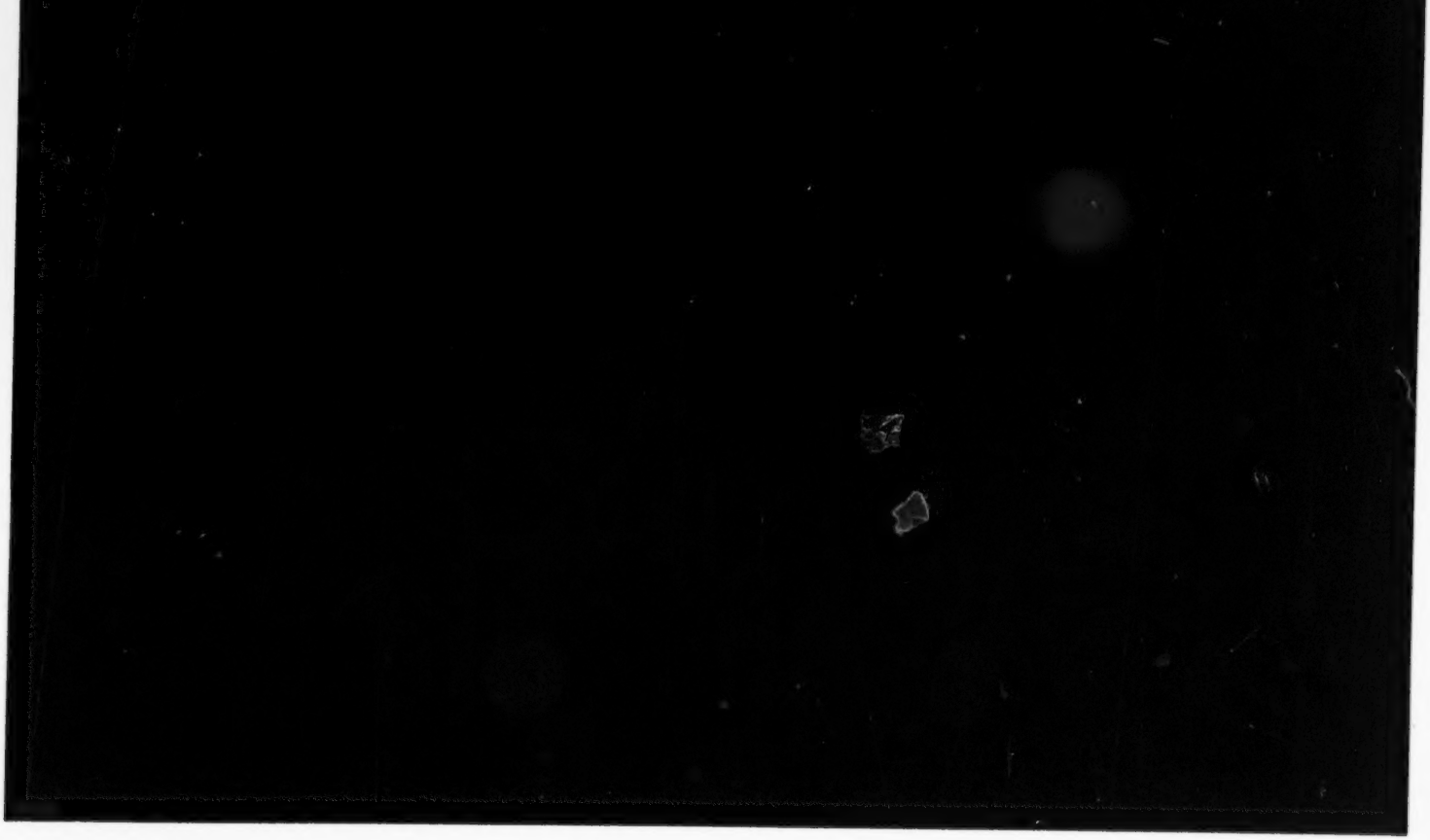
Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am counsel for the petitioner in the above entitled cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
May 6, 1952.

LEO R. FRIEDMAN,
Attorney for Petitioner.



In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

No.

PAUL C. NORWITT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS AND JUDGMENTS OF THE COURTS BELOW.

The judgment of the trial Court was rendered and filed on April 10, 1951. (R. 12-14.)

The decision of the Court of Appeals was rendered and filed on March 12, 1952. (R. 506.)

The judgment of the Court of Appeals was entered on March 12, 1952. (R. 527.)

Petition for rehearing denied on April 14, 1952. (R. 528.)

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

The basis on which it is contended this Court has jurisdiction and cases in support thereof are fully set forth in the foregoing petition at page 31 thereof.

STATEMENT OF THE CASE.

Petitioner was indicted (R. 3-6) for three violations of attempting to evade income taxes (26 U.S.C. 145b; Sec. 145b, Internal Revenue Code). Count 1 charged that petitioner, as president of the General Refrigerator Corporation, in 1945 filed a false and fraudulent income tax return for said corporation for the fiscal year ending July 31, 1941. Counts 2 and 3 charged that petitioner, a married man, in 1945 filed false and fraudulent joint returns for the years 1942 and 1943. (While the indictment charged the filing of such joint returns, in fact the returns involved in counts 2 and 3 were amended returns, the petitioner having filed in 1942 and 1943 respectively original joint income tax returns.)

A full statement of the case is set forth in the foregoing petition at pages 4 to 31.

SPECIFICATION OF ERRORS RELIED UPON.

1. The opinion of the Court of Appeals is in error in holding that where a person files a false and fraudulent income tax return for a particular taxable year and there-

after files a false amended return for the same taxable year, the filing of such amended return constitutes a new and separate violation of 18 U.S.C. sec. 145b.

2. The opinion of the Court of Appeals is in error in holding that there can be two or more violations of said Section 145b by the same person for the same taxable year, involving the same taxes and the same income.

3. The opinion of the Court of Appeals is in error in holding that it is no defense to a charge of attempting to evade income taxes, by filing an alleged false return, where the taxpayer has employed a certified accountant to whom he has made full disclosure of all available books and records and his assets and liabilities and the return is honestly prepared by such accountant on a net worth basis, merely because the taxpayer had theretofore lied to the income tax officials by stating that all his books and records had been destroyed.

4. The opinion of the Court of Appeals is in error in holding that a person can be convicted for filing alleged false and fraudulent income tax returns, where the proof offered of unreported income amounts to no more than mere speculation, assumption, surmise and conjecture.

5. The opinion of the Court of Appeals is in error in holding that one can be guilty of filing a false and fraudulent income tax return on behalf of a corporation, where there is no proof that the return, though signed by defendant, was ever filed by him or under his authority, thus misconstruing the scope of review where insufficiency of the evidence is in issue.

6. The opinion of the Court of Appeals is in error in holding as still the law the rule that where a defendant

"The crime denounced by §145(b) of wilfully attempting to defeat or evade the tax is complete when the taxpayer wilfully and knowingly files a false and fraudulent return with intent to defeat or evade any part of the tax due the United States. Guzik v. United States, 7th Cir. 54 F.(2d) 618, 619, Certiorari denied 285 U.S. 545, 52 S.Ct. 395, 76 L.Ed. 937; Bowles v. United States, 4th Cir. 73 F.(2d) 772, 774."

Cave v. United States, (8th Cir.) 159 F. (2d) 464; *Myres v. United States,* (8th Cir.) 174 F. (2d) 329, 335.

In the case of *United States v. Cole,* (DC-Cal.) 90 Fed. Supp. 147, defendant was charged with violating the provisions of Sec. 145b and the district judge granted a motion for judgment of acquittal. He first quoted from the language of the *Cave* case above set forth and then at p. 154 states:

"By the same token if the criminal act is not committed at that time, *we cannot take a subsequent act and retroject it to the time of filing and charge it as criminal.*

"If a criminal act is established as of a definite date, a criminal or fraudulent act committed later may bear on the intent and be admissible, but we cannot base criminality solely upon something that was done after the return has been made, unless it is of a character to show conclusively the existence of the criminal purpose at the earlier date. (See *U. S. v. Renee Icecream Co.,* Third Circuit 1947, 160 Fed.(2d) 353 and 357.)"

In the instant case, for each of the years 1942 and 1943 petitioner and his wife, within the time required by law,

had filed *original* income tax returns for such years. It was not until the year 1945 that the *amended returns* for 1942 and 1943 were filed. As the offense of violating Sec. 145b is not a continuing offense and as such crime is completed when a false and fraudulent return is filed, it must follow that any act done thereafter relating to such years cannot constitute an attempt to evade the tax for such years. Such attempt had been completed and a defendant can only be tried and convicted once for such offense: as said in the *Cole* case, supra, any act done after the completion of the offense can only bear upon the intent with which the act was done constituting the offense.

If the law were not as above stated, the bar of the statute of limitations could never become operative as to any particular year. Furthermore, appellant could never avail himself of the plea of once in jeopardy if the law were other than as stated. Let us assume that petitioner had been tried and convicted for filing a false and fraudulent original return for the year 1942, can he again be tried and convicted for filing an amended return in 1945 for the same year of 1942? Would not appellant, under such circumstances, have committed but one crime for which he was tried and punished? We believe the answers to these questions are obvious.

Let us assume a different set of facts. Assuming that the defendant was tried and convicted for filing a false and fraudulent return in 1942 and thereafter, in order to avoid the payment of a just tax for such year, he secreted his assets in the year 1943 and again secreted them in 1944 and in 1945 transferred them from one

is charged with two or more offenses the judgment will not be reversed as to any such offense if the evidence sustains the conviction on any one count and the sentence imposed does not exceed that which might lawfully be imposed on such single count, despite the language of this Court in the case of *Fiswick v. United States*, 329 U.S. 211.

ARGUMENT.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT WHERE A PERSON FILES A FRAUDULENT INCOME TAX RETURN FOR A PARTICULAR YEAR AND THEREAFTER FILES A FALSE AMENDED RETURN FOR THE SAME YEAR, THE FILING OF SUCH AMENDED RETURN CONSTITUTES A NEW AND SEPARATE VIOLATION OF 18 U.S.C. SECTION 145b.

On April 15, 1943 petitioner and his wife filed their joint income tax return for the year 1942 (R. 24) and on June 23, 1945 they filed their amended return for 1942 (R. 25). On March 15, 1944 they filed their original income tax return for the year 1943 (R. 24) and on June 23, 1945 they filed their amended return for said year 1943. (R. 25.) Counts Two and Three of the indictment are based on the falsity of the amended returns filed in 1945 for the years 1942 and 1943.

Petitioner conceded that the original joint returns were false and understated the taxable income and the Government established the falsity of the original returns.

Petitioner contended that when he filed the original joint returns for the years 1942 and 1943. This constituted a violation of Sec. 145b; that a violation of said section was not a continuing offense and could only be

committed once for any taxable year and from this premise contended that the filing of the amended returns, even though they were false (which is not admitted), did not constitute a new and separate offense.

The Court of Appeals ruled to the contrary (R. 520-522) and held that there could be several separate offenses by the same person in attempting to evade the tax on his income for one taxable year. Thus, the Court of Appeals in effect held: (a) that a person for one taxable year and involving the same income could be guilty of 365 separate offenses; (b) that the statute of limitations never ran against an attempt to evade an income tax; and (c) that the defense of jeopardy was not available to one who had been tried and convicted of filing a false income tax return and thereafter filed a false amended return for the same year.

An attempt to evade a tax and the payment thereof is not a continuing offense. While there may be such a crime in each year for which an income tax is due, once the attempt has been consummated by the filing of a false and fraudulent return in any particular year, the offense has been completed for that year and nothing done thereafter to carry out the initial unlawful purpose for such year can constitute a new offense. Such is the holding in *United States v. Johnson,* 123 Fed. (2d) 111, 119. (Overruled on other grounds in *United States v. Johnson,* 319 U.S. 503.)

It has been the invariable holding of our Courts that where one files a false and fraudulent return as a wilful attempt to evade the tax or payment thereof the crime is complete upon the filing of such return.

State to another and placed them in a safe deposit box under a fictitious name. Would each of these acts constitute a new and distinct crime? We think not. Under the law, a violation of Sec. 145b can only take place once for any particular taxable year.

As stated above, any holding to the contrary would render nugatory the statute of limitations.

We call attention to two early decisions of our Supreme Court which have been cited and followed with approval down to the present time.

In the case of *Adams v. Woods*, 2 Cranch 336, 2 L.Ed. 297, an action had been brought to recover a penalty of $2,000.00 under an Act of Congress prohibiting the carrying on of the slave trade from the United States to any foreign country. The defendant claimed that more than two years (the Statute of Limitations) had elapsed from the time of his carrying on said slave trade. The Government argued (1) that it was not a criminal action and therefore not governed by the limitation of criminal actions and (2) that the non-payment of the penalty was a continuous offense against which the statute did not run. Chief Justice Marshall delivered the opinion of the Court and held first, that as it was to recover a criminal penalty, it was a criminal action. The Court then stated:

> "In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be sup-

posed that an individual would remain forever liable to a pecuniary forfeiture."

Earlier in the decision, the Chief Justice stated as follows:

> "Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information; and to declare that the information was barred while the action of debt was left without limitation, would be to attribute a capriciousness on this subject to the legislature, which could not be accounted for; and to declare that the law did not apply to cases on which an action of debt is maintainable, would be to overrule express words, and to give the statute almost the same construction which it would receive if one distinct member of the sentence was expunged from it. In this particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie. It would be singular if the one remedy should be barred and the other left unrestrained."

In *United States v. Irvine,* 98 U.S. 450, 25 L.Ed. 193, the defendant was charged as the agent and attorney of Mrs. Berkeley with wrongfully withholding from her a pension in the sum of $500. The facts showed that in December of 1870 Mrs. Berkeley had demanded her money and that the defendant had refused to pay her and had never paid her up to the filing of the indictment in 1875. The defendant pleaded the two year statute of limitations. In holding that the two year statute applied, the Court said:

"But whatever this may be which constitutes the criminal act of withholding, it is a thing which must be capable of proof to a jury, and which, when it once exists, renders the party liable to indictment.

There is in this but one offense. When it is committed, the party is guilty and is subject to criminal prosecution, and from that time, also, the Statute of Limitations applicable to the offense begins to run.

It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and perhaps the pensioner is dead; but the fact of his receipt of the money is matter of record in the pension office.

He pleads the statute of two years, a statute which was made for such a case as this; but the reply is: You received the money. You have continued to withhold it these twenty years; every year, every month, every day, was a withholding, within the meaning of the statute.

We do not so construe the Act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution."

The above authorities have been cited and the same line of reasoning pursued in the cases of *Gompers v. United States*, 233 U.S. 604, 58 L.Ed. 1115 and *Pendergast v. United States*, 317 U.S. 412, 87 L.Ed. 369.

For the foregoing reasons the filing of the amended returns in 1945 did not constitute a new and distinct

crime. The evidence
established the falsi
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l the falsity of the *original* returns. The filing
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admit) could only have been filed for the pur-
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If guilty of any c
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y of any crime or crimes at all, appellant was
the offense denounced by Sec. 145b when he
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completed for each of such years and no act of
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g an analogy between the facts at bar and a
al set of facts of where a man makes 366 un-
attempts to assassinate the President of the
ates, correctly holding that in such instance the
l be guilty of 366 separate crimes. However,
othetical facts do not coincide with the facts
e at bar. In the case assumed by the Court of
ach attempt was unsuccessful in that the crime
was not completed. In the instant case, the
he original false and fraudulent returns com-
offense denounced by Sec. 145b. Thus, if the
succeeded in assassinating the President on his
pt, an attempt to again kill him would not con-
rime.

Lastly, the Court
v. United States, 27
13 Fed. (2d) 923. I
tion raised, discuss
the Court of Appeals relies on the case of *Levy*
States, 271 Fed. 942 and *United States v. Smith*,
2d) 923. In neither of these cases was the ques-
d, discussed or decided that the offense was

complete on the filing of the original return. The only question raised was that a person could not be convicted for filing a fraudulent return marked "amended" as the law did not provide for any such thing as an amended return.

We submit that the question involved is of paramount importance and should be decided by this Court. Sec. 145b prescribes a crime that can only be committed once for any particular income during any particular year.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER COULD NOT RELY ON THE CORRECTNESS OF THE AMENDED RETURNS AS PREPARED BY HIS ACCOUNTANT, AND THAT THE EVIDENCE ESTABLISHED WILFULNESS AND INTENT TO DEFRAUD.

The Court of Appeals held "that Norwitt was not entitled to rely on the income computed by his accountant when he withheld from him the information whence that income could have been correctly determined." (R. 519.) This holding is contrary to the record and to the law. While it is true that there is evidence given by the Government's witnesses Washauer (R. 289) and Stephenson (R. 35) that Norwitt told these parties that all of his records had been destroyed by fire, there is no evidence in the record that he so mis-informed his accountant, Spivock. The record is just the contrary and establishes that the accountant had made available to him, all of the existing books and records of Norwitt and the corporation.

The question involved is not whether Norwitt lied to the Internal Revenue Agents as to the existence of books

and records, but is whether Norwitt made such books and records available to his accountant.

Nathan Spivock, the accountant employed by Norwitt to prepare the income tax returns, *called as a Government witness,* testified that Norwitt made available to him such books and records; that the same were inadequate to prepare a 100% proper return; that he examined the records and satisfied himself that a proper return could not be prepared because they did not contain all of the necessary information; that some of the records were spoiled by water damage, the ink had run and you couldn't read the writing; that other parts of the records were singed and partially burned (R. 198); that if he had had any knowledge of a large group of invoices which had been unrecorded, he would still have made the returns on the net worth basis because without all of the records a proper return could not have been made. (R. 218-19.)

The lower Court's holding that Norwitt was not entitled to rely on the amended returns prepared on a net worth basis because he had withheld certain books and records from his accountant is thus refuted by the Government's own witness. There is no question but what there had been a fire; there is no question that some of the records were destroyed and others illegible. There was no evidence to refute Spivock's testimony that without a complete legible set of records, a proper return could not be made on either a receipt and disbursement basis or an accrual basis. The recognized procedure in such cases is to make a return on a net worth basis.

There is no contention that any assets were withheld from Spivock or the Government in the computation of

Norwitt's net worth. Under the circumstances set forth in our "Statement of the Case" and as summarized hereafter, Norwitt had the absolute right and was correct in relying on the computations made by his accountant and in signing the returns that were presented to him by an agent of the Internal Revenue Department.

In addition to proof that income tax returns were erroneous in not correctly reflecting the taxable income, there must be proof by the Government that the returns were filed "wilfully". To establish this latter element, the Government must prove knowledge of the falsity of the return and that it was filed with the specific intent to defraud the Government. (*Lurding v. United States* (6th Cir), 179 Fed. (2d) 419, 422; *Hargrove v. United States* (5th Cir.) 67 Fed. (2d) 820, 823.) Where a taxpayer employs a certified public accountant to make out his income tax return and he signs the same believing that it is a true and correct representation of his taxable income, he is not guilty of any crime if the return is inaccurate or contains an understatement of his taxable income. (*Lurding v. United States* (6th Cir.), 179 Fed. (2d) 419, 421.)

The evidence in this case firmly establishes that the amended returns filed for the years 1942 and 1943 were prepared by a certified public accountant after successive conferences with representatives of the Internal Revenue Department and *were brought to Norwitt for his signature by a Deputy Collector of Internal Revenue; that Norwitt had every right to believe that the figures contained in the returns were correct and had been approved*

not only by his own accountant, but by the Internal Revenue Department. The facts are as follows:

Nathan Spivock, a Government witness, testified: that in order to prepare the amended returns for 1942 and 1943 he had discussions with Deputy Collectors (R. 199), as a result of which the net worth method was used. The discussions covered a month or two. (R. 200.) The main subject discussed with Washauer and Mohr was the best way to get the thing straightened out. The Collector's Office asked for a financial statement and also requested prior returns for 1939, 1940 and 1941. Spivock told the Deputy Collectors of the condition of the records and that it was almost physically impossible to make a proper return due to the condition of the records and the element of time. The matter was discussed back and forth with the Revenue Agents and it was finally agreed to use the net worth method. (R. 201.)

Spivock further testified that he examined the books and records of Norwitt and of the General Refrigerator Corporation; that some were missing; that the ink had run on some; that you couldn't read the writing on others; that some were singed and partially burned; that he discussed this matter with the Deputy Collectors (R. 202); that it was impossible to prepare correct returns if any of the records were inaccurate or missing; that it was decided to use December 31, 1944 for determining Norwitt's net worth at that date and to start with zero as of January 1, 1939 (R. 202); that in discussions with the Collector's Office, Spivock advised the Collectors that they would allocate the net worth over the years from 1939 to 1944 putting the smallest amounts of the alloca-

tions in the earlier years and the biggest amounts in the later years (R. 205); that he personally obtained everything possible as to Norwitt's assets and liabilities in preparing the net worth statement (R. 209); that he figured out Norwitt's estimated living expenses (giving the basis therefor) and took the figures to the Deputy Collector's Office and raised them and the final figures were used in the amended returns.

Harry Stephenson, the accountant in the employ of Mr. Spivock, testified that in the course of his work he found a schedule of unrecorded sales which had not been included in the original returns. (R. 36.) There were also some sales of refrigerators which were sold and had not been included (R. 37); *that the information about the unrecorded sales of refrigerators and the other unrecorded sales came to him from Mr. Norwitt* (R. 38); that he was present at a conference in the Collector's Office in June; that Mr. Washauer and Mr. Mohr were present. The purpose of the conference was to arrive at figures for Norwitt's living expenses which would be satisfactory to the Government and there was a discussion about the amount of the estimated living expenses (R. 55-6); that the returns for the years 1941, 1942 and 1943 were prepared without reference to the original returns and for the purpose of representing to the Government the full taxable income for those years; that the amended returns were prepared upon the basis that the original returns were not correct. (R. 66.) The net worth system of computation was used for the purpose of representing to the Government the entire taxable income. (R. 67.)

Adolph Washauer testified that the suggestion of a net worth statement came from Mr. Spivock. (R. 297.) He testified to meetings with Mr. Spivock on February 6th and June 4th, 5th, 6th, 12th, 13th, 22nd and 23rd of 1945 (R. 317-18); that he made no suggestion to Spivock that a 1944 net worth statement be used (despite the fact that it was his office that demanded such statement) (R. 325); that there were discussions with Spivock about living expenses (R. 326); *that the purpose of the conferences with Spivock from the time Washauer got the financial statement until June 22nd was that Mr. Spivock wished to file amended returns for the taxpayer on the basis of net worth increase* (R. 329); that when the topic came up of Norwitt's living expenses Spivock suggested a lower figure; I felt it was too low; then he raised the figure to a higher figure. (R. 329.) We thought it was too low so he raised it. (R. 330.)

Washauer further testified that all the returns were typed in his office and were taken down by his deputy, Mr. Roder, to Norwitt for Norwitt's signature. (R. 332.)

Gustave C. Roder called as a witness by the Government testified that he was a deputy collector of internal revenue; that he took the delinquent returns for 1939, 1940 and 1941 and the amended returns for 1942 and 1943 down to Mr. Norwitt's office and Mr. Norwitt signed them in his presence (R. 348); that Mr. Washauer handed him the returns on June 22nd and that he, Roder, typed them up from the handwritten returns (R. 349); that after typing up the returns he made an appointment with Mr. Norwitt by telephone and then went to Mr. Norwitt's office and that Mr. Norwitt's wife was present and signed

taxable income for the years involved. Evidence in this regard which amounted to no more than surmise, assumption, suspicion or conjecture was wholly insufficient to sustain the Government's burden of proof. (*Garrison v. United States* (5th Cir.), 163 Fed. (2d) 874; *Towbin v. United States*, 93 Fed. (2d) 861.)

Without discussing the facts, the lower Court has assumed that, based upon some method of computation other than the net worth method, the Government established unreported taxable income for the years 1941, 1942 and 1943. There was no competent evidence to establish such fact. The facts which the Government advanced as showing the understatement of income are set forth on page 21 of its brief filed in the lower Court as follows:

> "By competent and wholly uncontroverted evidence, the Government proved the appellant's true net income for the year 1942 to have been $31,586.76. This evidence is summarized on pages 2 and 3 of Government Exhibit 31, as compiled from the testimony of Thomas W. Cleary (R. 138, et seq.); Geraldine Peterson (R. 99, et seq.); Bernard Chirar (R. 105, et seq.); William F. Bobadilla (R. 115, et seq.); and Richard Stewart (R. 361, et seq.). This factual exposition of true net income in the amount of $31,586.76 need only be compared with the net income reported on the amended return for the year 1942 in the amount of $11,540.74 (Government's Ex. 2), or an approximate understatement of $20,000.00. By a like method of proof and from the testimony of William F. Bobadilla (R. 115, et seq., 233 et seq.); Robert B. Hatfield (R. 113, et seq.); and Bernard Shirar (R. 105, et seq.), as compiled on pages 4 and 5 of Government's Exhibit 31, the Government con-

clusively proved appellant's net income for the year 1943 to have been $32,822.63, whereas on the amended return the net income was stated to be $28,081.04. (Government's Ex. 3.)"

A mere inspection of the record discloses that the foregoing computation is without support in the evidence. Where appellee refers to "true net income" the figures are referring to "gross income" and not taxable income.

William F. Bobadilla testified as to having added up certain sales tags which were found in the Mission Street premises and at Crescent Avenue. (R. 119-122.)

Bobadilla further testified that *he didn't have complete books from which to make any computation;* that he had the sales register for one or two years (R. 117); and that *he didn't have a complete set of records to check against;* that he had sales tags and checks and that *there was not sufficient bills or records to make an audit or to verify anything.* (R. 246-7.)

Thomas W. Cleary testified that of all the records he eventually acquired, there were some missing parts, particularly the sales register for 1942 (R. 147); that part of the ledger sheets for the years 1942 and 1943 had been reconstructed. (R. 148.) He further testified that, in adding up the sales tags which had been found, for the year 1941 he found sales totaling $9026.32 that had not been recorded in the sales register (R. 161); that for the year 1942 he found a total of $21,830.60 which bore no posting reference to that year. (R. 164.) He further testified that he had no sales register for the year 1942 but that *he assumed*, because certain tags had checkmarks on them

the returns where her signature was necessary. (R. 350.) When he made the appointment with Norwitt over the telephone "I said that I had a few returns which required his signature which were brought in by his accountant, and that I would appreciate it if he were present, together possibly with his wife, so that they could sign their signatures on the return. 'Q. Yes. First you identified yourself to him, told him who were were? A. Oh, yes, absolutely.'" (R. 352.)

When I came to Mr. Norwitt's office he just signed the returns. I was there about ten or fifteen minutes. (R. 353.) (Here the witness was shown the returns for 1939, 1941, 1942 and 1943 and his attention called to the fact that in each instance the signature of Freda Norwitt was signed by Paul C. Norwitt and so appears on the returns (R. 353-5), that though there were requirements as to who should sign the returns "we wouldn't be very specific about that"; that we would assume the correct signature was on there. (R. 354.) I stood right there while the returns were being signed but I had no right to question Mr. Norwitt. (R. 355.)

From the foregoing it is apparent that Mr. Norwitt signed the returns under the direction of Mr. Roder; that Roder identified himself as being connected with the Collector's Office of Internal Revenue; that he, the deputy, had the returns in his possession; that they had been prepared by Mr. Norwitt's accountant and that within ten or fifteen minutes from the time Roder entered Norwitt's place of business, Roder left with all the returns signed. There were eight returns, one each for Paul Norwitt and Freda Norwitt for the years 1939, 1940 and 1941 and

joint returns for the years 1942 and 1943. Clearly, Mr. Norwitt had no opportunity to examine the figures on these eight returns but, *being brought in by a Collector of Internal Revenue under the circumstances narrated above and Norwitt having employed a certified public accountant to prepare these returns, he could not do otherwise than believe that they were true and correct and had been approved both as to form and fact by the Internal Revenue officers.*

Under the authorities cited above, there was a total failure of proof on the part of the Government to establish any "wilfulness" or intent to defraud on the part of Norwitt.

III. THE OPINION OF THE COURT OF APPEALS IS IN ERROR IN HOLDING THAT FALSITY OF THE CORPORATE RETURN AND THE TWO AMENDED RETURNS WAS ESTABLISHED BY EVIDENCE THAT AMOUNTED TO NO MORE THAN MERE SPECULATION, ASSUMPTION, SURMISE AND CONJECTURE.

The greater part of the Government's case consisted of proof directed to the falsity of the original returns filed for the years 1942 and 1943; that these returns were inaccurate and understated the taxable income was always admitted by petitioner. Admission or proof that the original returns were false and fraudulent could not establish the falsity of the amended returns. (See *United States v. Johnson* (7th Cir.), 123 Fed. (2d) 111.)

The burden was on the Government to establish to a moral certainty and beyond a reasonable doubt that each of the returns involved in the indictment understated the

and others did not, that those without checkmarks represented sales that had neither been recorded nor reported. (R. 157, 158.)

Cleary further testified that he found sales tags with check marks on them that had not been entered in the books and he also found sales tags with no check marks on them which had been entered in the books. (R. 180.)

Bobadilla further testified that in going over checks issued by the General Refrigerator Corporation and Norwitt's personal cancelled checks, he allotted to Norwitt's personal living expenses, great numbers of those checks *which appeared to him* as being the personal withdrawals and expenditures of petitioner (R. 124) and which he therefore allotted to Norwitt's personal living expenses (R. 244, 245); that *he assumed* that Norwitt had taken the money in cash and deposited the check in the bank (R. 249); that although there was a possibility that the money had been paid out in cash and the check drawn therefor and put in the bank (R. 250), he didn't adopt that assumption but *adopted the theory against Mr. Norwitt.* (R. 250.)

Mere proof of gross income does not establish net taxable income. Bobadilla testified there was not enough material to verify or audit any of the invoices or bills payable by the General Refrigerator Corporation. (R. 247.)

Mere proof of sales and the price thereof is insufficient to establish net taxable income. (*Yoffee v. United States* (1st Cir.) 153 Fed. (2d) 570, 576.)

It necessarily follows that the figures relied upon as establishing net taxable income were the mere assumptions, surmises and speculations of the Government's witnesses.

> "Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This, of course, is inadmissible."
> *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 344, 77 L.Ed. 819, 825.

The Court of Appeals in upholding the convictions has ignored the presumption of innocence, disregarded the law that places the burden of proof beyond reasonable doubt upon the Government and has held that a conviction can be sustained on evidence that amounts to no more than speculation, surmise and conjecture.

IV. THE COURT OF APPEALS ERRED IN LIMITING ITS SCOPE OF REVIEW WHERE INSUFFICIENCY OF THE EVIDENCE IS INVOLVED AND IN HOLDING THAT THERE WAS PROOF THAT THE CORPORATE RETURN HAD BEEN FILED BY PETITIONER OR UNDER HIS AUTHORITY.

At the conclusion of all the evidence in the case, petitioner moved for judgments of acquittal, which motions were denied. (R. 8.) The motions were made on the grounds of insufficiency of the evidence to support each or any count of the indictment. The same questions were raised on appeal.

This Court has oft announced the law that under the foregoing circumstances:

> "A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict."
>
> *Abrams v. United States,* 250 U.S. 616, 619, 63 L.Ed. 1173, 1177.
>
> *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 254, 84 L.Ed. 1129, 1184.

The Court of Appeals has ignored the foregoing rule by holding that there was sufficient evidence to support the conviction on count one even though there was no competent or substantial evidence to establish that the corporate return was ever filed by or under the direction of petitioner. The Court of Appeals has picked out one statement made by the Government's witness Washauer that the corporate return "was given to him by Shapro for filing" (R. 509) as being sufficient to establish the fact.

The evidence relative to the filing of the corporate return is correctly summarized as follows:

Adolph Washauer testified that in early 1945 he went to the office of Mr. Shapro, attorney for petitioner, to receive certain papers relative to the corporation; that Shapro gave him certain papers among which was the corporate return for the year 1941 (R. 292); that he called Shapro's attention to the fact that the return was sworn to on October 1, 1941 and that Shapro said: "Well, we forgot to file" and that was all that was said (R.

294-5); that when Shapro gave him the return there was no discussion as to why it had not been filed; that Shapro gave him the return as part of the records he had (R. 355); that the return was given to him for filing by Shapro but he didn't file it until the following June (R. 305) because it wasn't properly sworn to. (R. 305.)

Arthur Shapro, testified that he never handled any income tax returns or matters for Norwitt or the corporation (R. 426); that he first saw the return in the office of Mr. Boland of the Internal Revenue Department who told him the same had been found among some of the records of the corporation and that it had not been filed with the Collector's Office (R. 426); that he, Shapro, never had that return or any return in his possession and never delivered it to Mr. Washauer or to anyone else and never told Washauer or anyone else that they should file the document. (R. 423, 424.)

Ralph Mohr, who accompanied Mr. Washauer to Mr. Shapro's office, testified that he was present when Shapro delivered the corporate papers to Washauer and to him; that he examined the papers and there was no income tax return among them.

John J. Boland, called to refute Shapro's testimony, did not deny that the return was in his possession but merely stated that he had no recollection about any conversation about any income tax return (R. 486) and did not recall seeing the delinquent tax return for the corporation at the meeting with Shapro. (R. 487.) He further testified that he did not have very much recollection about the meeting at all. (R. 487.)

We therefore have a situation where the evidence of Washauer is itself contradictory, he stating that the return was given to him for filing; that it was merely given to him as part of the records that Shapro had; that nothing was said by Shapro about the return as to why it had not been filed when he delivered the papers to him, etc.

Shapro also testified that he never had the corporate return and never gave it to anyone for filing.

As we have pointed out above, the circumstances surrounding the signing of the returns are most peculiar. The eight individual returns were typed in the Internal Revenue Department's office and by one of its agents. They were brought to Mr. Norwitt for signature by Mr. Roder, an Internal Revenue Agent, and were signed by Norwitt in front of Roder who made no protest when Norwitt signed the returns that should have been signed by Mrs. Norwitt. It is extremely probable that the corporate return was among the returns presented to Norwitt for signing by Roder because Ralph Mohr of the Internal Revenue Department testified that the first time he saw the corporate return was on the daily reports he checked for Mr. Roder. It was on the daily copy of June 23, 1945 (R. 491); that a deputy who is collecting someone's income tax return at the end of the day or the following day makes a report of that day's activities and attaches it to the returns that were involved in those activities. (R. 493.) It must be remembered that it was Mr. Roder who made the report referred to by Deputy Mohr and that it was Roder who took the income tax returns to Norwitt for his signature.

A mere scintilla of evidence is insufficient to sustain the burden of proof. (*Pennsylvania R. Co. v. Chamberlin,* 288 U.S. 333, 343.)

Thus we find Mr. Washauer testifying in various manners as to the return; that it was given to him for filing; that it wasn't given to him for filing; that he received it in February; that it wasn't filed until June, etc.

Where a witness testifies in two manners relative to a particular transaction—that a certain thing did happen and that a certain thing did not happen—such evidence is wholly insufficient to support any claim on the part of the party who bears the burden of proof. The rule is correctly set forth by the Supreme Court of California in the case of *Reese v. Smith,* 9 Cal. (2d) 324, 328, 70 Pac. (2d) 933, as follows:

> "In that connection it should be noted that upon the issues raised by the pleadings, the plaintiff was bound to assume the burden of proof and in the end prevail by a preponderance of the evidence. If the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary. (Patterson v. San Francisco etc. Ry. Co., 147 Cal. 178 [81 Pac. 531].) A judgment cannot be based on guesses or conjectures. (Puckhaber v. Southern Pac. Co., 132 Cal. 363 [64 Pac. 480].) And, also 'A finding of fact must be an inference drawn from evidence rather than on a mere speculation as to probabilities without evidence. A majority of chances never can suffice alone to establish a proposition of fact, since the slightest real evidence would outweigh all contrary probabilities. (23 Cor. Jur., sec. 1750, p. 18.)' "

See also:

Leach v. Board of Dental Examiners, 87 Cal. App. 207, 262 Pac. 61.

The Supreme Court of the United States has announced the rule as follows:

"We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. (Citing cases.)

The rule is succinctly stated in Smith v. First Nat. Bank, 99 Mass. 605, 611, 612, 97 Am. Dec. 59, quoted in the Des Moines Nat. Bank case (C.C.A. 8th) 145 Fed. 273, supra:

'There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.'"

Penn. R. Co. v. Chamberlain, 288 U.S. 333, 339-340, 77 L.Ed. 819, 823.

Applying the foregoing rules to the facts, the conclusion must be arrived at that the Government failed to sustain

its burden of proof as to the filing of the corporate return. In fact, all of the evidence preponderated in favor of the view that the return was never filed by Norwitt or under his authority. The mere statement of Washauer that the return was given to him for filing is ridiculous. Washauer testified that the return was not executed by the proper officers; that he received it in February and did not file it or cause it to be filed until late in June without giving any adequate explanation for the long delay.

We submit there was no substantial or competent evidence to support the Government's contention that the corporate return was filed by Norwitt or under his authority and that the Court of Appeals has erred in not applying the foregoing rules and in holding that there was substantial and competent evidence to establish such fact.

V. THE COURT OF APPEALS IS IN ERROR IN HOLDING THAT IT IS STILL THE RULE OF LAW THAT A JUDGMENT WILL NOT BE REVERSED WHERE A DEFENDANT IS CHARGED WITH TWO OR MORE OFFENSES AND THE EVIDENCE SUPPORTS THE CONVICTION ON ANY ONE COUNT AND THE SENTENCE IMPOSED DOES NOT EXCEED THAT WHICH MIGHT LAWFULLY BE IMPOSED ON SUCH SINGLE COUNT.

The Court of Appeals, apparently realizing that as to some counts of the indictment its holding that the evidence was sufficient was subject to question, has relied upon the rule that a Court need not consider the sufficiency of the evidence introduced as to all counts of an indictment since the sentence imposed did not exceed that which might lawfully have been imposed under any single

count, and that the judgment must be affirmed if the evidence is sufficient to sustain any one of the counts. (R. 524.)

We realize that this rule has been many times announced by this Court but we believe, under the language of this Court in *Fiswick v. United States,* 329 U.S. 211, 220, that the rule should no longer prevail. In the *Fiswick* case, Fiswick was sentenced to eighteen months and had served this time when his case came before the Supreme Court where it was argued that the matter had become moot. This Court held to the contrary on the ground that certain penalties and disabilities attached to the sentence and that Fiswick was entitled to have these removed even though he had served his time.

In the instant case, Norwitt has been convicted of three felonies. These convictions deprive him of certain civil rights and lay him open to impeachment for having been convicted of three felonies and operate to deprive him of his rights to procure licenses to operate businesses (he being presently engaged in the business of selling wines and liquors which require licenses), etc.

A man may be convicted of three or four offenses all charged in the same indictment, three of which involve moral turpitude and one of which does not. The offenses involving moral turpitude may not have found support in the evidence but the conviction on all four offenses would be upheld under the foregoing rule if the evidence supported and the sentence imposed did not exceed that which might lawfully be imposed on the count that did not involve moral turpitude. Of course, a great distinction

exists between these two classes of offenses. Offenses involving moral turpitude carry with them great stigma and deprivation of rights, while offenses not involving moral turpitude fall into a different category. Thus, in California, a lawyer or doctor may be convicted of a felony and, if it does not involve moral turpitude, can retain his professional license. If the offense does involve moral turpitude the conviction carries with it a loss of such professional license. (*In Re Rothrock,* 16 Cal. (2d) 449, 106 P. (2d) 907.)

We therefore submit that the rule so oft announced by this Court requires reconsideration. No man should be required to go through life bearing the stigma and penalties of several convictions of a felony where as a matter of law and fact, he has only been guilty of one offense.

Dated, San Francisco, California,
May 6, 1952.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	8
Conclusion	12

CITATIONS

Cases:

Abrams v. *United States*, 250 U. S. 616	11
Borgia v. *United States*, 78 F. 2d 550, certiorari denied, 296 U. S. 615	11
Fiswick v. *United States*, 329 U. S. 211	11
~~*Fiswick* v. *United States*, 329 U. S. 211~~	~~11~~
Glasser v. *United States*, 315 U. S. 60	11
Henderson v. *United States*, 143 F. 2d 681	11
Hirabayashi v. *United States*, 320 U.S. 81	9
Levy v. *United States*, 271 Fed. 942	11
Morrissey v. *United States*, 67 F. 2d 267, certiorari denied, 293 U. S. 566	11
Pasadena Research Laboratories v. *United States*, 169 F. 2d 375	11
Pinkerton v. *United States*, 328 U. S. 640	10
Spies v. *United States*, 317 U. S. 492	9
United States v. *Hall*, 52 F. Supp. 796	9
United States v. *Smith*, 13 F. 2d 923	2

Statute:

Internal Revenue Code, Sec. 145 (26 U.S.C. 1946 ed., Sec. 145)	2

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 761

PAUL C. NORWITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 506-526) is reported at 195 F. 2d 127.

JURISDICTION

The judgment of the Court of Appeals was entered on March 12, 1952. (R. 527.) The petition for rehearing was denied on April 14, 1952. (R. 528.) The petition for a writ of certiorari was filed on May 10, 1952. The jurisdiction of this

Court is invoked under the provisions of 28 U.S.C., 1254(1). See also Rules 37 (b)(2) and 45(a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether, after an admittedly false return has been filed, the additional filing of a false and fraudulent amended return constitutes an attempt to defeat and evade a tax under Section 145(b) of the Internal Revenue Code.

2. Whether the evidence was sufficient to sustain the verdict.

3. Whether, after a finding of guilty on a three-count indictment, a general sentence not exceeding the sentence which might have been imposed on each count should be upheld if the evidence sustains conviction on any one count.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in

addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * *

(26 U.S.C. 145.)

STATEMENT

Petitioner was indicted on August 16, 1950, in the District Court for the Northern District of California on three counts. Count one charged that petitioner wilfully attempted to defeat and evade a large part of the taxes due and owing by the General Refrigerator Corporation for the fiscal year ended July 31, 1941, by filing and causing to be filed a false and fraudulent tax return wherein he alleged that the net income of the corporation was $317.05 and that the tax due thereon was $47.08, whereas the net income of the corporation was $9,905.68 upon which the tax due was $2,990.24. (R. 3-4)

Count two charged that petitioner wilfully attempted to evade and defeat a large part of the income tax due and owing by him and his wife for the year 1942 by filing a false and fraudulent joint income tax return wherein he stated that their joint net income for the calendar year was $11,540.74 and that the tax due thereon was $2,731.48, whereas their joint net income for that year was $30,806.76 and the tax due was $12,744.37. (R. 4-5.)

Count three charged that petitioner wilfully attempted to evade and defeat a large part of the income and victory tax due and owing by him and his wife for the year 1943 by filing and causing to be filed a false and fraudulent joint income and victory tax return wherein he stated that their joint net income for the calendar year was $28,081.04 and that the tax due thereon was $11,760.88, whereas their joint net income for that year was $46,805.43 and the tax due was $24,010.50. (R. 5-6.)

The court below found that the tax return of the General Refrigerator Corporation, which forms the basis of the first count in the indictment, was prepared in 1941 by William McIntosh, a public accountant, and turned over by him to the petitioner. (R. 360.) The corporate return was signed by the petitioner, as president, and by Marco Norwitt, the petitioner's brother, as vice president. (R. 509.) The return, although prepared in 1941, was not filed until June 23, 1945. (R. 509.) It was first submitted to Adolph Washauer, Division Chief of the Office of the Collector of Internal Revenue at San Francisco, California, in May, 1945, by Arthur P. Shapro, attorney for petitioner. At the time the petitioner's attorney, Arthur P. Shapro, first submitted the 1941 corporate return to Mr. Washauer, he said: "Well, we forgot to file." Sometime later, Nathan Spivock, the petitioner's accountant, borrowed the return, but later returned it. (R. 508-509.) Arthur P. Shapro had given the return to Adolph Washauer for filing. (R. 509.)

Although the return was filed on June 23, 1945, the jurat is dated June 25, 1945. (R. 509.)

The tax returns, which form the basis for counts two and three, were both filed on June 23, 1945. These were amended returns. Original returns had been filed for the calendar years 1942 and 1943 on April 15, 1943, and March 15, 1944, respectively. (R. 509-510.)

The evidence produced by the Government showed that the amended returns were prepared under the following circumstances: In the spring of 1945, prior to March 15th, the petitioner employed Nathan Spivock to prepare the petitioner's and his wife's income tax returns for 1944. Harry J. Stephenson, an employee of Nathan Spivock, handled most of the details. In the course of his work Mr. Stephenson learned that certain rental income had been omitted from the original returns filed for 1942 and 1943 and recommended that amended returns be filed for those years. Mr. Stephenson also learned that the petitioner had engaged in business as the General Refrigerator Corporation and requested the records of that venture. The petitioner advised Mr. Stephenson that the records had been destroyed by fire. (R. 510-511.) Nathan Spivock was also advised by petioner that part of his records were destroyed by fire. (R. 198.) In the absence of records the petitioner's amended returns for 1942 and 1943 were prepared by use of the net worth method of accounting. (R. 199-215.) Mr. Spivock obtained the net worth information from the petitioner after

explaining to the petitioner the necessity of obtaining complete and accurate information. (R. 43-44.) From the information supplied by the petitioner, Mr. Stephenson prepared the amended returns which were filed for 1942 and 1943. (R. 39, 42.) Each of the amended returns contained the following statement: "It is not possible to obtain exact figures or details because the taxpayer's records were destroyed by fire in 1943." (R. 512.) The petitioner also advised Adolph Washauer and Ralphe Mohr that all of his records, the refrigerator company's as well as his own, had been burned. (R. 511.)

The Government produced evidence that all of the petitioner's records had not been destroyed by fire. Early in February, 1945, Adolph Washauer and his assistant, Ralphe Mohr, visited the petitioner's former place of business and had exhibited to them five or six corporate books belonging to the old company. In November, 1945, Special Agent Thomas W. Cleary visited the former offices of petitioner and saw "a pile of records, canceled checks, sales invoices." Shortly thereafter, the special agent, together with Deputy Collector William F. Bobadilla, Robert Farrell and Ralphe Mohr, again visited the petitioner's former office and obtained the records. The records consisted of correspondence, purchase invoices, a few balance sheets and accountant's balance sheets. During this last visit R. W. Pfeiffer, manager of the new company, advised that he had called the petitioner several times but that the petitioner had not come

to pick up the records. (R. 512-513.) Subsequently, in March, 1946, Special Agent Cleary unearthed four cardboard boxes of sales slips in the basement of a residence at 32 Crescent Avenue, San Francisco, California. (R. 142-143.) This residence had formerly been occupied by the petitioner. (R. 51-52.) Thereafter, in October, 1947, the petitioner, at the request of Special Agent Cleary, submitted the rest of his books. (R. 513.) The sales invoices found by the special agent represented sales made by the petitioner during the three years involved in this case and which were not posted to the petitioner's sales register. (R. 513.) A large majority of these sales invoices were in the handwriting of the petitioner. (R. 395, 401.) The records disclosed that credit sales had been posted to the sales register and that all of the larger cash sales, such as those found in the invoices located at 32 Crescent Avenue, were not posted at all. (R. 155.) Additional testimony was adduced to the effect that sales had been made by the petitioner for which there were neither sales tags nor book recordation. (R. 513.)

By use of the records obtained during the investigation, the Government was able to reconstruct the petitioner's corrected income. The Government's computation of income of the General Refrigerator Corporation for the fiscal year ended July 31, 1941, and the personal income of the petitioner, which were not recorded in his books and records but which were reflected by the sales invoices and other evidence, far exceeded the income

reported in the corporate return and the original and amended returns for the calendar years 1942 and 1943. The evidence showed a tax deficiency by the corporation for the fiscal year ended July 31, 1941, in the sum of $2,943.16 and a tax deficiency of $10,486.54 and $3,173.85 with respect to the returns filed for the calendar years 1942 and 1943, respectively. (R. 412-422.)

A motion for acquittal was made at the close of the case and was denied. (R. 8.) A verdict of guilty was returned as to each count by the jury on March 30, 1951. (R. 8-9.) A motion for new trial was denied on April 10, 1951. (R. 11.) The court sentenced the petitioner to imprisonment for a period of one year on each count, to run concurrently, and imposed a fine of $10,000 and costs of $796.12. (R. 11-12.)

On appeal the judgment was affirmed. (R. 527.)

ARGUMENT

1. In effect, petitioner contends with respect to Counts 2 and 3 that since he filed inaccurate original returns he cannot be charged with wilful attempted evasion based on the filing of false and fraudulent amended returns. The gist of the crime of tax evasion is the wilful attempt to evade and defeat. The attempt may be committed, in the language of the statute, "in any manner". The petitioner was charged with having attempted to evade tax by the filing of false and fraudulent returns. The fact that these returns were not the first ones filed by petitioner is immaterial. An offense

with respect to the original returns filed for the calendar years 1942 and 1943 was not in issue. The issue before the jury was whether the petitioner had filed false and fraudulent amended returns in his attempt to evade tax. Such acts constituted a proper basis for an evasion charge. In *Levy* v. *United States*, 271 Fed. 942, 943 (C.A. 3d) the court said:

> While amended or corrected income tax returns may not be prescribed by the statute, they are nevertheless allowed and received by the Treasury Department in the administration of the Income Tax Law, and on such returns taxes are assessed by the Commissioner of Internal Revenue. When so assessed, these are the taxes which under the law are charged against and collected from the taxable.

See also *United States* v. *Smith*, 13 F. 2d 923 (W.D. La.), and *United States* v. *Hall*, 52 F. Supp. 796 (D. Conn.).

2. As noted above, the means of attempted evasion was the filing of false and fraudulent returns. There was persuasive evidence of understatement of net income and consequent tax deficiencies.[1]

[1] For example, the Government proved that the records maintained by the petitioner did not contain all sales; that sales invoices, the majority of which were in the handwriting of petitioner and had been secreted in a former residence of the petitioner, had not been made a matter of record; that the petitioner had available or under his control adequate records from which proper returns could have been made; that the petitioner falsely advised his accountants and the Government representatives that his records had been destroyed by fire; that the petitioner concealed from his accountants the existence of his records; that the petitioner failed to make a complete disclosure of his books and records to his accountants

stands convicted are identical. The possible loss of civil rights would be the same whether he were convicted on one count, two, or three.

CONCLUSION

The decision of the court below is plainly correct and presents no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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ELLIS N. SLACK,
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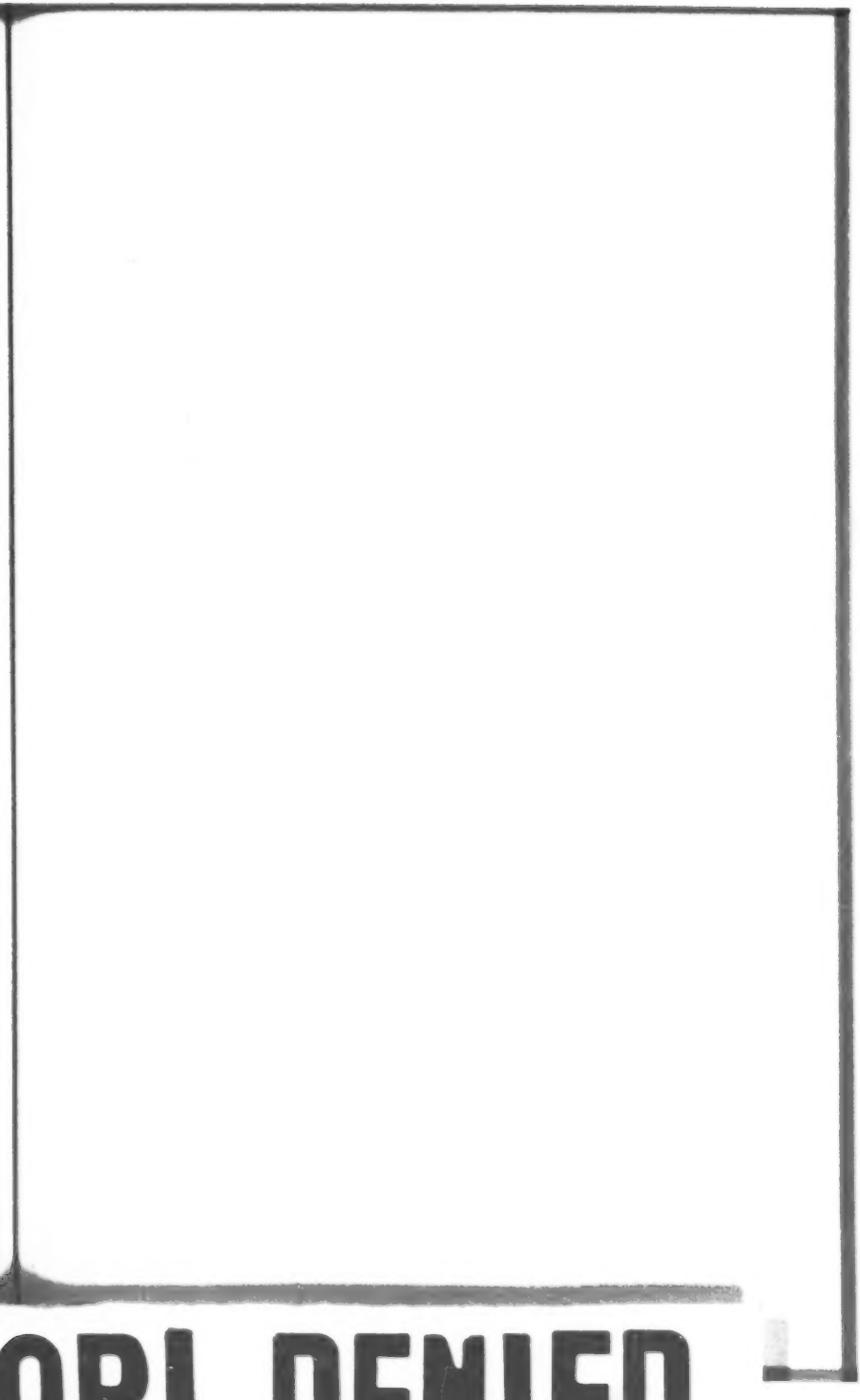
Special Assistants to the Attorney General.

JUNE, 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 909919 1952

CERTIORA


ARI DENIED

From all of the circumstances in the case, the jury was entitled to draw an inference of wilfulness and was not foreclosed by petitioner's alleged reliance on his accountants in view of the evidence that he withheld vital information from them. *Spies* v. *United States,* 317 U. S. 492, 499.

Petitioner particularly urges that the evidence was insufficient to establish that he filed or caused to be filed a false and fraudulent return for the corporation, as charged in count one of the indictment.[2] Although the facts surrounding the execution and filing of this return are far from clear, there was ample testimony from which the jury could find that petitioner did file or cause the fraudulent corporate return to be filed.[3]

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and knew that in the absence of records the accountants determined his income by the net worth method of accounting, which net worth information was supplied the accountants by petitioner.

[2] In the court below, petitioner argued that the fact that he was no longer an officer of the corporation at the date the corporate return was filed absolved him of responsibility. Apparently he no longer relies on that argument in this Court. In any event, the Court found that the evidence indicated that petitioner had in fact sworn to the returns in 1945 when they were filed, so that he purported to act for the corporation at that time and, moreover, he had a transferee's interest in the corporation tax (R. 515-516).

[3] William McIntosh testified that he had been employed by the petitioner in 1941 to prepare the tax return for the General Refrigerator Corporation for the fiscal year ended July 31, 1941 (R. 357), and that he prepared the return and delivered it to the petitioner. (R. 360.) Adolph Washauer testified that Arthur P. Shapro, the petitioner's attorney, submitted the return to him (Washauer) in May, 1945, for filing. (R. 295.) He testified further, that Nathan Spivock, the petitioner's accountant, asked that the return be turned back to him for assistance in preparing the amended returns; that this was done and that he resubmitted the return; that the

The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *Glasser* v. *United States,* 315 U. S. 60; *Henderson* v. *United States,* 143 F. 2d 681, 682 (C. A. 9th); *Pasadena Research Laboratories* v. *United States,* 169 F. 2d 375 (C. A. 9th); *Borgia* v. *United States,* 78 F. 2d 550 (C. A. 9th), certiorari denied, 296 U. S. 615; *Morrissey* v. *United States,* 67 F. 2d 267 (C. A. 9th), certiorari denied, 293 U. S. 566.

3. The basis of petitioner's objection to the general sentence is not clear, since the court below found that the evidence adduced at the trial was sufficient to sustain the verdict with respect to each of the three counts. Moreover, the sentence imposed did not exceed that which might have been imposed with respect to any single count. The judgment in this case should be affirmed, therefore, even if the evidence was insufficient to convict as to one or two counts. *Abrams* v. *United States,* 250 U. S. 616; *Pinkerton* v. *United States,* 328 U. S. 640, 642; *Hirabayashi* v. *United States,* 320 U. S. 81, 85. The case of *Fiswick* v. *United States,* 329 U. S. 211, relied upon by petitioner, is inapposite. It is no authority for the novel proposition advanced that conviction on all three counts here may deprive petitioner of certain civil rights if he is guilty with respect to only one count. (Pet. Br. 69-71.) The felonies of which the petitioner now

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corporate [redacted] urn was filed on June 23, 1945 (R. 295-296); that the corporate return was given to him (Washauer) for filing by Arthur P. Shapro. (R. 305.)